had not yet all received their "original" allotments under the acts of 1887 and 1889. Second, because the preliminary work necessary for the making of allotments under the Steenerson Act had not yet been done. For reasons which are fully explained in the opinion of this court in *Woodbury v. United States*, — Fed. —, these applications were premature, and created no right or interest in the land. August 8, 1904, Louis and Alice Mooers, minors, applied by their father for an allotment of the same lands as original allotments under the acts of 1887 and 1889. Their applications were accepted and filed. April 24, 1905, arrangements having been completed for the allotment of "additionals" under the Steenerson Act, the plaintiffs again presented their applications for the allotment of the lands in question under that statute. These applications were also received by the agent of the reservation. Thus two separate sets of applications were accepted at the same office for the same tracts of land. The rights of the parties in this suit depend upon which of the filings has priority. After much vacillation the Interior Department, by decision of the Secretary of the Interior, dated May 13, 1907, sustained the claims of the Mooers, and directed that the lands be allotted to them. The present suits were afterwards brought under the act of February 6, 1901 (31 Statutes at Large, 760), for a determination in court of complainants' rights. Decrees were entered in their favor, and the present appeals are brought to review those decisions.

AMIDON, District Judge, delivered the opinion of the court:

A preliminary question is raised by the government as to the jurisdiction of the court to deal with the rights of the Mooers in these suits. It is urged that under the act of 1891, the court has jurisdiction only to determine whether the plaintiff is entitled to any allotment of land on the reservation, but has no jurisdiction to determine conflicting rights between different applicants for allotment of the same lands. This contention is based upon the provision of the statute which reads as follows: "In said suit the parties thereto shall be the claimant, as plaintiff, and the United States as party defendant." We cannot give to this language the effect claimed by counsel for the government. An earlier part of the statute declares that all persons who have or claim a right to any allotment of land upon an Indian Reservation "may commence and prosecute *or defend* any action, suit or proceeding in relation to their right thereto in the proper Circuit Court of the United States." This language clearly extends the jurisdiction to the defense of rights as well as their assertion. The object of requiring the United States to be made a defendant is that it may exercise that supervision over allotments of land which is necessary to protect the rights of Indians. It seems to have been the practice to make adverse claimants parties with the government. *Smith v. Bonifer*, 132 Fed. 889; *Patava v. United States*, 132 Fed. 893; *Parr v. U. S.*, 132 Fed. 1004; *Smith v. United States*, 142 Fed. 225; *Waldron v. U. S.*, 143 Fed. 413. Of course, if the controversy is wholly between the United States and the Indian, involving only the question of his right to any

allotment, then the United States would be the only party defendant. *Sloan v. U. S.*, 118 Fed. 283.

The Mooers children are not made parties. We entertain a serious doubt as to whether the court could properly proceed to judgment in these cases and render decrees which so seriously affected their rights without their being made defendants. *Minnesota v. Northern Securities Co.*, 184 U. S., 199. But as that question is not raised by counsel, we pass it by.

In the pleadings no issue whatever is raised as to the capacity of the Mooers children to take an original allotment of land upon the reservation. No evidence was adduced upon that subject. The trial court, however, ascertained from their applications that the children were respectively 7 and 9 years of age, and reached the conclusion that since they must have been born subsequent to the date on which the acts of 1887 and 1889 took effect, they could not be entitled to allotments under those statutes. This was the principal ground of its decision adjudging their allotments to be void. We find nothing in the statutes to support such a holding. The original act of 1889 fixes no definite time for the making of allotments. The first section looks to an indefinite period. It begins as follows: "That in all cases where any tribe or band of Indians has been, *or shall hereafter be* located upon any reservation created for their use, * * * the president of the United States be, and he is hereby authorized, *whenever* in his opinion any reservation or any part thereof, of such Indians, is advantageous for agricultural and grazing purposes, * * * to allot the land in said reservation in severalty *to any Indians located thereon.*" In specifying the amount to go to the different classes of allottees, the statute uses this language: "To each other single person under eighteen years, now living, or who may be born prior to the date of the order of the president, directing an allotment of the lands embraced in any reservation." The evidence in this case does not show the date of the order of the president directing that allotments be made under this statute. In our judgment, however, the making of one order did not exhaust the powers of the president. The statute vests a continuing power, and he could provide from time to time for allotments in favor of those born upon the reservation subsequent to the first order dealing with the subject, so long as there were lands of the reservation which had not been allotted. The statute submits the whole subject of the distribution of the lands embraced in the reservation, to the President, acting through the Interior Department. This view receives confirmation from the language used in Section 3 of the Nelson Act of 1889, as follows: "And thereupon there shall, *as soon as practicable*, under the direction of said commissioners, be allotted lands in severalty to the Red Lake Indians on the Red Lake Reservation, and to all other of said Indians on the White Earth Reservation, in conformity with the act of 1887." These statutes have been interpreted by the Interior Department as vesting a continuing power. In fact, the agent before commencing allotments under the Steenerson Act, sent notice to all Indians whose names appeared upon the rolls, and who had not received original allotments, requiring them

to make their selections, and specifying that if they failed to do so it would be the duty of the agent to act in their behalf. Such a notice was sent to the father of the Mooers children in respect to their rights. The names of these children had been entered upon the rolls of the agency. They had received all the benefits of federal law, as members of the tribe, and the agent testified that his object in sending the notice was to call attention to their right to receive allotments because he was of the opinion that they were entitled thereto. Their ages appeared upon the face of their applications, and have passed before the Commissioner of the General Land Office, and the Secretary of the Interior. Those officers must have both become aware of the point raised by the trial court, and yet in their judgment the fact that the children were born subsequent to the date when the acts of 1887 and 1889 took effect, and possibly to the order of the President made for the purpose of carrying out those acts, did not seem to them to create any bar to their right to receive allotments. It having been the practice of the department to allot lands to Indians residing on the reservation, regardless of the time of their birth, it is quite likely that a decision adverse to that practice at this time would disturb titles long vested. The statutes relating to the White Earth Reservation are wholly different from those controlling the allotment of the lands of the five civilized tribes of Indian Territory. In that case a specific date was fixed, and it was provided that no Indian born upon the reservation subsequent to that date should be entitled to enrollment as a member of the tribe for the purpose of receiving an allotment. *Hayes v. Barringer*, 168 Fed. 221. We are of the opinion that the court erred in holding that the Mooers children were not entitled to "original" allotments.

The acts of 1887 and 1889 were confined to lands that were "advantageous for agricultural and grazing purposes." The department in construing this language ruled that lands which were chiefly valuable for the pine timber growing thereon, did not come within the statute. Such lands had therefore been excluded from allotment. The Steenerson Act abrogated this limitation. The agent was not aware of this feature of the Steenerson Act, and for that reason held that the Mooers' applications for the lands in question were invalid, and permitted the second filing. The trial court was also of the opinion that inasmuch as the Steenerson Act first gave a right to the allotment of pine lands, that all persons claiming such allotments should be treated alike, and that no allotment of such lands could be made until the agency was ready to begin the work of making additional allotments under the Steenerson Act. We think this ruling was erroneous. The regulation of the department excluding timber lands from the benefit of the statutes of 1887 and 1889 was itself questionable. A very large portion of the area of the United States at the present time devoted to agriculture was originally timber land. The effect of the Steenerson Act abolishing the rule was to leave the lands of the reservation the same as if the regulation had never been in force. As soon as that act took effect any Indian who had not received his original allotment was entitled to select therefor any unappropriated land on the reser-

vation. This was the interpretation of the Secretary of the Interior, and we think it accords with the provisions of the statute. It is true that allotments could not be made under the Steenerson Act until the preliminary work necessary for that purpose had been completed. But the Mooers children were not claiming under the statute. It related only to additional allotments. They were claiming original allotments under the Acts of 1887 and 1889. Depending upon those statutes they were not obliged to defer the choosing of their allotments until the time fixed for making allotments under the Steenerson Act.

Counsel for plaintiffs makes much of the fact that the father of the Mooers children had enclosed parcels of land with a fence, and had stated to his neighbors that he intended to claim those parcels as allotments for his children. The fact is, however, that he never made any application for those lands at the local land office, and in the absence of such applications the fencing in of the land gave the children no right or claim thereto. Their right to allotments must be determined by the proceedings which they took in the land office, and their applications for the lands here involved are the only proceedings of that character on their behalf.

The decrees must be reversed with directions to enter decrees dismissing the bills upon the merits.

Filed June 3, 1909.

(*Decree in Cause No.* 2926.)

And on the third day of June, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is a decree in cause No. 2926, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1909.

THURSDAY, *June* 3, 1909.

No. 2926.

UNITED STATES, Appellant,
vs.
ANNIE FAIRBANKS, a Minor; BENJAMIN FAIRBANKS, Her Guardian ad Litem.

Appeal from the Circuit Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, reversed without costs to either party in this Court.

It is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to enter a decree dismissing the bill of complaint upon the merits.

June 3, 1909.

(*Petition for Allowance of Appeal in Cause No.* 2926.)

And on the thirteenth day of July, A. D. 1909, the petition for the allowance of an appeal was filed in cause No. 2926, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2926.

UNITED STATES, Appellant,
vs.
ANNIE FAIRBANKS, a Minor, by Her Guardian ad Litem, BENJAMIN L. FAIRBANKS, Appellee.

Your petitioner, Annie Fairbanks, a minor, by her guardian ad litem, Benjamin L. Fairbanks, respectfully represents that there is manifest error committed, to the injury of your petitioner, by the final decree pronounced in this case on the 3rd day of June, 1909, in and by which final decree this court reversed the decrees and judgment of the United States Circuit Court for the Eighth Circuit, with directions to enter decrees dismissing the bills upon the merits.

Wherefore, your petitioner, considering herself aggrieved, prays an order granting an appeal from said final decree reversing the decrees and judgment of the United States Circuit Court, for the Eighth Circuit and District of Minnesota, with directions to enter decrees dismissing the bills upon the merits, as aforesaid, to the Supreme Court of the United States, as authorized by Section 6 of the Act of Congress of the United States, approved March 3, 1891, and prays this Honorable Court that said appeal be allowed, and that a transcript of the records, proceedings and papers upon which said final decree was made, duly authenticated, may be sent to the Supreme Court of the United States, and that pending said appeal further proceedings under said final decree, so far as the same relates to said Annie Fairbanks, may be stayed by the order of this court.

Your petitioner herewith files and offers her bond in the penalty of Five Hundred Dollars, and asks that the same be approved, and that the appeal be allowed.

GEORGE B. EDGERTON,
Attorney for Said Annie Fairbanks.

(Endorsed:) United States Circuit Court of Appeals, Eighth Circuit. No. 2926. United States, Appellant, vs. Annie Fairbanks, a minor, by her guardian ad litem, Benjamin L. Fairbanks, Appellee.

Petition for allowance of Appeal by Annie Fairbanks. Filed Jul-13, 1909, John D. Jordan, Clerk. George B. Edgerton, Attorney for Annie Fairbanks, 302 Natl. German American Bank Bldg., St. Paul, Minnesota.

(*Assignment of Errors on Appeal in Cause No.* 2926.)

And on the thirteenth day of July, A. D. 1909, the assignment of error on appeal was filed in cause No. 2926, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2926.

UNITED STATES, Appellant,
vs.
ANNIE FAIRBANKS, a Minor, by Her Guardian ad Litem, BENJAMIN L. FAIRBANKS, Appellee.

Assignment of Errors by Annie Fairbanks.

Now comes the said Annie Fairbanks, a minor, by her guardian ad litem, Benjamin L. Fairbanks, and for her assignment of errors in the above entitled action, says that in the final decree heretofore made and entered in said cause by the court aforesaid, there is error in the respects hereinafter set forth, that is to say:

1. The court erred in not affirming the judgment of the Circuit Court.

2. The court erred in reversing the decrees of the Circuit Court, with directions to enter decrees dismissing the bills upon the merits.

3. The court erred in holding that the Mooers children had a right to take an original allotment of land on the White Earth Reservation under the acts of February 8, 1887 and January 14, 1889.

4. The court erred in holding that the rule of the Land Department excluding pine timber from allotment to Chippewa Indians on the White Earth Reservation, under the acts of February 8, 1887 and January 14, 1889, was illegal and void.

5. The court erred in holding that the Steenerson Act of April 28, 1904, enlarged the provisions of the acts of February 8, 1887 and January 14, 1889.

6. The court erred in holding that the allotments to the Mooers children in 1904, by the United States Indian Agent, were valid, because no one had a right to make the allotments under the act of January 14, 1889, except the Commissioner appointed under and pursuant to the act of January 14, 1889.

7. The court erred in holding that the Steenerson Act revoked the rules of the Land Department in excluding pine timber lands

from the original allotments under the acts of February 8, 1887 and January 14, 1889.

8. The court erred in holding that the Steenerson Act gave any additional rights of allotment under the acts of February 8, 1887 and January 14, 1889.

9. The court erred in holding that the children of Mooers, by the application of August 8, 1904, obtained any priority in equity over said Edward L. Warren and Annie Fairbanks.

10. The court erred in holding that in the absence of applications for allotments, the fencing in of the land gave the children no right or claim thereto, and that their right to allotments must be determined by the proceedings which they took in the Land Office, and their applications for the land herein involved are the only proceedings of that character on their behalf.

11. The court erred in not holding that by the improvement of other lands upon the White Earth Reservation with intent to select them for his minor children, Samuel Mooers waived any rights to the lands in controversy, and is now estopped to claim them for his minor children.

12. The court erred in not holding that Samuel Mooers, in selecting other lands for his minor children in May, 1909, in lieu of the lands in controversy, was estopped from claiming the lands involved in this litigation for his said minor children.

13. The court erred in not holding that plaintiff's Exhibit 14, found on pages 134 and 135 of the transcript of record, being the decision of the acting Commissioner of Indian Affairs, under date of July 13, 1906, was final. The said decision held that the additional allotments to Warren and Annie Fairbanks should stand as made. This assignment of error is based upon the fact that no notice of appeal or review was given to Warren or Annie Fairbanks, or their attorney.

Wherefore, said Annie Fairbanks prays that the final decree of said Circuit Court of Appeals of the United States for the Eighth Circuit in the above entitled cause, so far as it relates to her, or to any of the matters assigned as errors, for the errors aforesaid and for other errors in the record and proceedings in said cause and in the final decree aforesaid, may be reversed and the said judgment of the United States Circuit Court for the District of Minnesota be affirmed.

GEORGE B. EDGERTON,
Attorney for Plaintiff.

(Endorsed:) United States Circuit Court of Appeals. Eighth Circuit. No. 2926. United States, Appellant, vs. Annie Fairbanks, a minor, by her guardian ad litem, Benjamin L. Fairbanks, Appellee. Assignment of Errors by Annie Fairbanks, a minor, etc. Filed Jul- 13, 1909, John D. Jordan, Clerk. George B. Edgerton, Attorney for Annie Fairbanks, 302 Natl. German American Bank Bldg., St. Paul, Minnesota.

(*Bond on Appeal in Cause No. 2926.*)

And on the thirteenth day of July, A. D. 1909, a bond on appeal of Annie Fairbanks, a minor, etc., was filed in cause No. 2926, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2926.

UNITED STATES, Appellant,
vs.
ANNIE FAIRBANKS, a Minor, by Her Guardian ad Litem, BENJAMIN L. FAIRBANKS, Appellee.

Know all men by these presents, That we, Annie Fairbanks, a minor, by her guardian ad litem, Benjamin L. Fairbanks, as principal, and Edward L. Warren and Daniel E. Foley, as sureties, are held and firmly bound unto the United States of America in the sum of Five Hundred Dollars ($500.00), to be paid to the United States of America, to which payment well and truly to be made we bind ourselves and our heirs and successors jointly and severally by these presents.

Sealed with our seals and dated this 10th day of July A. D. 1909.

Whereas the said Annie Fairbanks, a minor, by her guardian ad litem, Benjamin L. Fairbanks, has taken and prosecuted her appeal to the Supreme Court of the United States to reverse the final decree heretofore made and filed in the above entitled cause by said Circuit Court of Appeals of the United States for the Eighth Circuit:

Now, therefore, the condition of this obligation is such that if the above named Annie Fairbanks, a minor, by her guardian ad litem, Benjamin L. Fairbanks, shall prosecute her said appeal to effect and answer all costs and damages that may be adjudged or awarded against her if she shall fail to make good her appeal, then this obligation to be void; otherwise to remain in full force and virtue.

ANNIE FAIRBANKS, *a Minor,*
By Her Guardian Ad Litem,
BENJAMIN L. FAIRBANKS. [SEAL.]
EDWARD L. WARREN. [SEAL.]
DANIEL E. FOLEY. [SEAL.]

Signed, Sealed and Delivered in presence of

E. S. EDGERTON.
GEO. B. EDGERTON.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 10th day of July A. D. 1909, before me personally appeared Benjamin L. Fairbanks, to me known to be the person who executed the foregoing instrument in behalf of Annie Fairbanks, a minor, he being the duly appointed, qualified and acting guardian ad litem for said minor in said cause; and he acknowledged that he executed the same as the free act and deed of said Annie Fairbanks.

And on this 10th day of July, A. D. 1909, before me personally appeared Edward L. Warren and Daniel E. Foley to me known to *the* the persons described in and who executed the foregoing instrument and they acknowledged that they executed the same as their free act and deed.

[SEAL.] E. S. EDGERTON,
Notary Public, Ramsey County, Minn.

My commission expires Mar. 2, 1916.

STATE OF MINNESOTA,
County of Ramsey, ss:

Edward L. Warren and Daniel E. Foley being first duly sworn, depose and say, and each for himself severally deposes and says that he is a freeholder of the State of Minnesota, and that he is worth over and above all his just debts and liabilities and over and above all property exempt from execution the sum of One Thousand Dollars.

EDWARD L. WARREN.
DANIEL E. FOLEY.

Subscribed and sworn to before me this 10th day of July, 1909.

[SEAL.] E. S. EDGERTON,
Notary Public, Ramsey County, Minn.

My commission expires Mar. 2, 1916.

The foregoing bond and the sureties thereon are hereby approved. Dated July 10, 1909.

WILLIS VAN DEVANTER,
Circuit Judge.

(Endorsed:) United States Circuit Court of Appeals, Eighth Circuit. No. 2926. United States, Appellant, vs. Annie Fairbanks, a minor, by her guardian ad litem, Benjamin L. Fairbanks, Appellee. Bond on Appeal of Annie Fairbanks, a minor, etc. Filed Jul- 13, 1909, John D. Jordan, Clerk.

(Affidavit as to Amount in Controversy in Cause No. 2926.)

And on the thirteenth day of July, A. D. 1909, an affidavit as to the amount in controversy was filed in cause No. 2926, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2926.

UNITED STATES, Appellant,
vs.
ANNIE FAIRBANKS, a Minor, by Her Guardian ad litem, BENJAMIN L. FAIRBANKS, Appellee.

STATE OF MINNESOTA,
County of Ramsey, ss:

Benjamin L. Fairbanks and Edward L. Warren, each for himself, deposes and says, that he has been upon the West half of the Northwest quarter of Section 15, in Township 142, Range 39, State of Minnesota; that the said tract of land contains valuable pine timber thereon, and that he knows the value of said tract of land and that the same is worth and of the value of over Three Thousand Dollars, besides the costs of this action, and each deposes and says that the matter in controversy in said cause exceeds $3000, besides the costs of said action.

BENJAMIN L. FAIRBANKS.
EDWARD L. WARREN.

Subscribed and sworn to before me this 10th day of July, 1909.
[SEAL.] E. S. EDGERTON,
Notary Public, Ramsey County, Minnesota.

My Commission expires March 2, 1916.

(Endorsed:) United States Circuit Court of Appeals, Eighth Circuit. No. 2926. United States, Appellant, vs. Annie Fairbanks, a minor, by her guardian ad litem, Benjamin L. Fairbanks, Appellee. Affidavit as to Amount in Controversy. Filed Jul- 13, 1909, John D. Jordan, Clerk. George B. Edgerton, Attorney for Annie Fairbanks.

(Order Allowing Appeal to Annie Fairbanks, a Minor, etc., in Cause No. 2926.)

And on the thirteenth day of July, A. D. 1909, an order allowing an appeal to Annie Fairbanks, a minor, etc., was filed in cause No. 2926, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2926.

UNITED STATES, Appellant,
vs.
ANNIE FAIRBANKS, a Minor, by Her Guardian ad litem, BENJAMIN L. FAIRBANKS, Appellee.

The above named Annie Fairbanks, a minor, by her guardian ad litem, Benjamin L. Fairbanks, having prayed for the allowance of an appeal to the Supreme Court of the United States from the final decree heretofore made and filed in the above entitled cause, reversing the decrees of the United States Circuit Court for the District of Minnesota, Eighth Circuit, with directions to enter decrees dismissing the bills upon the merits, so far as the same relates to said Annie Fairbanks, or to any of the matters assigned by her as error in her assignment of errors filed herewith, and that pending said appeal further proceedings under said final decree may be stayed by the order of this court; and said Annie Fairbanks, by her guardian ad litem, Benjamin L. Fairbanks, having filed a bond with surety satisfactory to this court, in the penalty of Five Hundred Dollars, conditioned on the prosecution of said appeal to effect by said Annie Fairbanks, by her guardian ad litem, Benjamin L. Fairbanks, and to answer all damages and costs of said Annie Fairbanks fails to make said appeal good:

It is now therefore ordered that said appeal of said Annie Fairbanks be, and the same is, hereby allowed; that said bond be, and the same is, hereby approved, and that further proceedings under said final decree be, and the same are, hereby stayed pending said appeal.

Dated July 10", 1909.

WILLIS VAN DEVANTER,
Circuit Judge.

(Endorsed:) United States Circuit Court of Appeals, Eighth Circuit. No. 2926. United States, Appellant, vs. Annie Fairbanks, a minor, by her guardian ad litem, Benjamin L. Fairbanks, Appellee. Order allowing appeal to Annie Fairbanks, a minor, etc. Filed Jul 13, 1909, John D. Jordan, Clerk.

(Citation on Appeal of Annie Fairbanks, a Minor, etc., in Cause No. 2926.)

And on the thirteenth day of July, A. D. 1909, a citation on the appeal of Annie Fairbanks, a minor, etc., was filed in cause No. 2926, the original of which, with the admission of service endorsed thereon, is hereto attached and herewith returned:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2926.

UNITED STATES, Appellant,
vs.
ANNIE FAIRBANKS, a Minor, by Her Guardian ad litem, BENJAMIN L. FAIRBANKS, Appellee.

Citation.

UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be at the Supreme Court of the United States at Washington, on the 9th day of August, A. D. 1909, pursuant to an order granting an appeal from a final decree filed in the office of the Clerk of the United States Court of Appeals for the Eighth Circuit, wherein Annie Fairbanks, a minor, by her guardian ad litem, Benjamin L. Fairbanks, is appellant, and you are appellee, to show cause, if any there be, why the final decree mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Willis Van Devanter, one of the judges of the Circuit Court of the United States, for the Eighth Circuit, this 10th day of July, in the year of our Lord one thousand nine hundred and nine.

WILLIS VAN DEVANTER,
Circuit Judge.

Service of the above citation admitted this 10th day of July, 1909.

CHAS. C. HOUPT,
United States Attorney and Solicitor for United States.

[Endorsed:] United States Circuit Court of Appeals, Eighth Circuit. No. 2926. United States, Appellant, vs. Annie Fairbanks, a minor, by her guardian ad litem, Benjamin L. Fairbanks, Appellee. Citation on appeal of Annie Fairbanks, a minor, etc. Filed July 13, 1909. John D. Jordan, clerk. George B. Edgerton, Attorney for Appellant, 302 Nat'l German American Bank Bldg., St. Paul, Minnesota.

(*Appearance of Counsel for Appellee on Appeal of Edward L. Warren in Cause No. 2927.*)

And on the twenty-first day of September, A. D. 1908, the appearance of counsel for appellant was filed in cause No. 2927, in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Eighth Judicial Circuit, December Term, A. D. 1908.

THE UNITED STATES OF AMERICA, Appellant,
vs.
EDWARD L. WARREN, Respondent.

Error from the United States Circuit Court for the District of Minnesota, Sixth Division.

To the Clerk of the above named Court:

You will please enter my appearance as solicitor for the Respondent in the above entitled cause.

GEO. B. EDGERTON,
Solicitor for Respondent.

Dated St. Paul, Minnesota, August 25th, 1908.

(Endorsed:) No. 2927. United States Circuit Court of Appeals, for the Eighth Judicial Circuit. The United States of America, Appellant, vs. Edward L. Warren, Respondent. Filed Sep. 21, 1908. John D. Jordan, Clerk. Geo. B. Edgerton, Solicitor for Respondent, St. Paul, Minnesota.

(*Appearance of Mr. Charles C. Houpt as Counsel for Appellant in Cause No.* 2927.)

And on the twenty-third day of September, A. D. 1908, the appearance of Mr. Charles C. Houpt, as counsel for the appellant, was filed in cause No. 2927, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2927.

UNITED STATES, Appellant,
vs.
EDWARD L. WARREN.

The Clerk will enter my appearance as Counsel for Appellant.

CHAS. C. HOUPT,
United States Attorney, St. Paul, Minn.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2927. United States, Appellant, vs. Edward L. Warren. Appearance. Filed Sep. 23, 1908, John D. Jordan, Clerk. Charles C. Houpt, Counsel for Appellant.

(*Appearance of Mr. R. J. Powell as Counsel for Appellant in Cause No. 2927.*)

And on the nineteenth day of January, A. D. 1909, the appearance of Mr. R. J. Powell, as counsel for appellant, was filed in cause No. 2927, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2927.

UNITED STATES, Appellant,
vs.
EDWARD L. WARREN.

The Clerk will enter my appearance as Counsel for the Appellant.
R. J. POWELL,
312-14 *Lumber Exch. Bld., Minneapolis, Minn.*

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2927. United States, Appellant, vs. Edward L. Warren. Appearance. Filed Jan. 19, 1909, John D. Jordan, Clerk. R. J. Powell, Counsel for Appellant.

(Order of Submission in Cause No. 2927.)

And on the twenty-second day of January, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in cause No. 2927, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1908.

FRIDAY, *January* 22, 1909.

No. 2927.

UNITED STATES, Appellant,
vs.
EDWARD L. WARREN.

Appeal from the Circuit Court of the United States for the District of Minnesota.

This cause having been called for hearing in its regular order, argument was commenced by Mr. R. J. Powell in behalf of the appellant, continued by Mr. George B. Edgerton for the appellee and concluded by Mr. R. J. Powell for the appellant.

Thereupon the cause was submitted to the Court upon the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the third day of June, A. D. 1909, the opinion of said United States Circuit Court of Appeals for the Eighth Circuit was filed in cause No. 2927, which said opinion is omitted at this point for the reason that the same appears in full at page 180 of this transcript.

(*Decree in Cause No.* 2927.)

And on the third day of June, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is a decree in cause No. 2927, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1909.

THURSDAY, *June* 3, 1909.

No. 2927.

UNITED STATES, Appellant,
vs.
EDWARD L. WARREN.

Appeal from the Circuit Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, reversed without costs to either party in this Court.

It is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to enter a decree dismissing the bill of complaint upon the merits.

June 3, 1909.

(*Petition for Allowance of Appeal in Cause No.* 2927.)

And on the thirteenth day of July, A. D. 1909, a petition for the allowance of an appeal by Edward L. Warren was filed in cause No. 2927, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2927.

UNITED STATES, Appellant,
vs.
EDWARD L. WARREN, Appellee.

Your petitioner, Edward L. Warren, respectfully represents that there is manifest error committed to the injury of the petitioner by the final decree pronounced in this case on the 3rd day of June, 1909, in and by which final decree this court reversed the decrees and judgment of the United States Circuit Court for the Eighth Circuit, with directions to enter decrees dismissing the bills upon the merits.

Wherefore, your petitioner, Edward L. Warren, considering himself aggrieved, prays an order granting an appeal from said final decree reversing the decrees and judgment of the United States Circuit Court, for the Eighth Circuit and District of Minnesota, with directions to enter decrees dismissing the bills upon the merits, as aforesaid, to the Supreme Court of the United States, as authorized by Section 6 of the Act of Congress of the United States, approved March 3, 1891, and prays this Honorable Court that said appeal be allowed, and that a transcript of the records, proceedings and papers upon which said final decree was made, duly authenticated, may be sent to the Supreme Court of the United States, and that pending said appeal further proceedings under said final decree, so far as the same relates to said Edward L. Warren, may be stayed by the order of this court.

Your petitioner herewith files and offers his bond in the penalty of Five Hundred Dollars, and asks that the same be approved, and that the appeal be allowed.

GEORGE B. EDGERTON.
Attorney for said Edward L. Warren.

(Endorsed:) United States Circuit Court of Appeals, Eighth Circuit. No. 2927. United States, Appellant, vs. Edward L. Warren, Appellee. Petition for allowance of Appeal by Edward L. Warren. Filed Jul- 13, 1909. John D. Jordan, Clerk. George B. Edgerton, Attorney for said Edward L. Warren, 302 Nat'l German American Bank Bldg., St. Paul, Minnesota.

(Assignment of Errors on Appeal of Edward L. Warren in Cause No. 2927.)

And on the thirteenth day of July, A. D. 1909, an assignment of errors on appeal by Edward L. Warren was filed in Cause No. 2927, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2927.

UNITED STATES, Appellant,
vs.
EDWARD L. WARREN, Appellee.

Assignment of Errors by Edward L. Warren.

Now comes the said Edward L. Warren and for his assignment of errors in the above entitled action, says that in the final decree heretofore made and entered in said cause by the court aforesaid there is error in the respects hereinafter set forth, that is to say:

1. The court erred in not affirming the judgment of the Circuit Court.

2. The court erred in reversing the decrees of the Circuit Court, with directions to enter decrees dismissing the bills upon the merits.

3. The court erred in holding that the Mooers children had a right to take an original allotment of land on the White Earth Reservation under the acts of February 8, 1887 and January 14, 1889.

4. The court erred in holding that the rule of the Land Department excluding pine timber from allotment to Chippewa Indians on the White Earth Reservation under the acts of February 8, 1887 and January 14, 1889, was illegal and void.

5. The court erred in holding that the Steenerson Act of April 28, 1904, enlarged the provisions of the acts of February 8, 1887 and January 14, 1889.

6. The court erred in holding that the allotments to the Mooers children in 1904, by the United States Indian Agent, were valid, because no one had a right to make the allotments under the act of January 14, 1889, except the Commissioner appointed under and pursuant to the act of January 14, 1889.

7. The court erred in holding that the Steenerson Act revoked the rules of the Land Department in excluding pine timber lands from the original allotments under the acts of February 8, 1887 and January 14, 1889.

8. The court erred in holding that the Steenerson Act gave any additional rights of allotment under the acts of February 8, 1887 and January 14, 1889.

9. The court erred in holding that the children of Mooers, by the application of August 8, 1904, obtained any priority in equity over said Edward L. Warren and Annie Fairbanks.

10. The court erred in holding that in the absence of applications for allotments, the fencing in of the land gave the children no right or claim thereto, and that their right to allotments must be determined by the proceedings which they took in the Land Office and their applications for the land herein involved are the only proceedings of that character on their behalf.

11. The court erred in not holding that by the improvement of other lands upon the White Earth Reservation with intent to select them for his minor children, Samuel Mooers waived any rights to the lands in controversy, and is now estopped to claim them for his minor children.

12. The court erred in not holding that Samuel Mooers, in selecting other lands for his minor children in May, 1905, in lieu of the lands in controversy, was estopped from claiming the lands involved in this litigation for his said minor children.

13. The court erred in not holding that plaintiff's Exhibit 14, found on pages 134 and 135 of the transcript of record, being the decision of the acting Commissioner of Indian Affairs, under date of July 13, 1906, was final. The said decision held that the additional allotments to Warren and Annie Fairbanks should stand as made. This assignment of error is based upon the fact that no notice of appeal or review was given to Warren or Annie Fairbanks, or their attorney.

Wherefore, said Edward L. Warren prays that the final decree of said Circuit Court of Appeals of the United States for the Eighth Circuit in the above entitled cause, so far as it relates to him, or to any of the matters assigned as errors, for the errors aforesaid and for other errors in the record and proceedings in said cause and in the final decree aforesaid, may be reversed and the said judgment of the United States Circuit Court for the District of Minnesota be affirmed.

GEORGE B. EDGERTON,
Attorney for Plaintiff.

(Endorsed:) United States Circuit Court of Appeals, Eighth Circuit. No. 2927. United States, Appellant, vs. Edward L. Warren, Appellee. Assignment of Errors by Edward L. Warren. Filed Jul 13, 1909, John D. Jordan, Clerk. George B. Edgerton, Attorney for Edward L. Warren, 302 Nat'l German American Bank Bldg., St. Paul, Minnesota.

(Bond on Appeal of Edward L. Warren in Cause No. 2927.)

And on the thirteenth day of July, A. D. 1909, the bond on Appeal of Edward L. Warren was filed in cause No. 2927, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2927.

UNITED STATES, Appellant,
vs.
EDWARD L. WARREN, Appellee.

Know All Men By These Presents, That we, Edward L. Warren, as principal, and Benjamin L. Fairbanks and Daniel E. Foley as

sureties, are held and firmly bound unto the United States of America in the sum of Five Hundred Dollars ($500.00) to be paid to the United States of America, to which payment well and truly to be made we bind ourselves and our heirs and our successors jointly and severally by these presents.

Sealed with our seals and dated this 10th day of July, A. D. 1909.

Whereas the said Edward L. Warren has taken and prosecuted his appeal to the Supreme Court of the United States to reverse the final decree heretofore made and filed in the above entitled cause by said Circuit Court of Appeals of the United States for the Eighth Circuit:

Now, therefore, the condition of this obligation is such that if the above named Edward L. Warren shall prosecute his said appeal to effect and answer all costs and damages that may be adjudged or awarded against him if he shall fail to make good his appeal, then this obligation to be void; otherwise to remain in full force and virtue.

EDWARD L. WARREN. [SEAL.]
BENJAMIN L. FAIRBANKS. [SEAL.]
DANIEL E. FOLEY. [SEAL.]

Signed, Sealed and Delivered in presence of
E. S. EDGERTON.
GEO. B. EDGERTON.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 10th day of July, 1909, before me personally appeared Edward L. Warren, Benjamin L. Fairbanks and Daniel E. Foley, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

[SEAL.] E. S. EDGERTON.
Notary Public, Ramsey County, Minn.

My commission expires Mar. 2, 1916.

STATE OF MINNESOTA,
County of Ramsey, ss:

Benjamin L. Fairbanks and Daniel E. Foley being first duly sworn, depose and say, and each for himself severally deposes and says that he is a freeholder of the State of Minnesota, and that he is worth over and above all his just debts and liabilities and over and above all property exempt from execution the sum of one Thousand Dollars.

BENJAMIN L. FAIRBANKS.
DANIEL E. FOLEY.

Subscribed and sworn to before me this 10th day of July, 1909.

[SEAL.] E. S. EDGERTON.
Notary Public, Ramsey County, Minn.

My commission expires Mar. 2, 1916.

The foregoing bond and the sureties thereon are hereby approved.

WILLIS VAN DEVANTER,
Circuit Judge.

Dated July 10, 1909.

(Endorsed:) United States Circuit Court of Appeals, Eighth Circuit. No. 2927. United States, Appellant, vs. Edward L. Warren, Appellee. Bond on Appeal of Edward L. Warren. Filed Jul- 13, 1909, John D. Jordan, Clerk.

(*Affidavit as to Amount in Controversy in Cause No.* 2927.)

And on the thirteenth day of July, A. D. 1909, an affidavit as to the amount in controversy was filed in cause No. 2927, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2927.

UNITED STATES, Appellant,
vs.
EDWARD L. WARREN, Appellee.

STATE OF MINNESOTA,
County of Ramsey, ss:

Benjamin L. Fairbanks and Edward L. Warren, each for himself, deposes and says, that he has been upon the East half of the Northwest quarter of Section 15, Township 142, Range 39, State of Minnesota; that the said tract of land contains valuable pine timber thereon, and that he knows the value of said tract of land and that the same is worth and of the value of over Three Thousand Dollars, besides the costs of this action, and each deposes and says that the matter in controversy in said cause exceeds $3000, besides the costs of said action.

BENJAMIN L. FAIRBANKS.
EDWARD L. WARREN.

Subscribed and sworn to before me this 10th day of July, 1909.

[SEAL.] E. S. EDGERTON,
Notary Public, Ramsey County, Minnesota.

My commission expires March 2, 1916.

(Endorsed): United States Circuit Court of Appeals. Eighth Circuit. No. 2927. United States, Appellant, vs. Edward L. Warren, Appellee. Affidavit as to Amount in Controversy. Filed Jul- 13, 1909, John D. Jordan, Clerk. George B. Edgerton, Attorney for Edward L. Warren.

(*Order Allowing Appeal to Edward L. Warren in Cause No. 2927.*)

And on the thirteenth day of July, A. D. 1909, an order allowing an appeal to Edward L. Warren was filed in cause No. 2927, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2927.

UNITED STATES, Appellant,
vs.
EDWARD L. WARREN, Appellee.

The above named Edward L. Warren having prayed for the allowance of an appeal to the Supreme Court of the United States from the final decree heretofore made and filed in the above entitled cause, reversing the decrees of the United States Circuit Court for the District of Minnesota, Eighth Circuit, with directions to enter decrees dismissing the bills upon the merits, so far as the same relates to said Edward L. Warren, or to any of the matters assigned by him as error in his assignment of errors filed herewith, and that pending said appeal further proceedings under said final decree may be stayed by the order of this court; and said Edward L. Warren having filed a bond with surety satisfactory to this court, in the penalty of Five Hundred Dollars, conditioned on the prosecution of said appeal to effect by said Edward L. Warren and to answer all damages and costs if said Warren fails to make said appeal good;

It is now therefore ordered that said appeal of said Edward L. Warren be, and the same is, hereby allowed; that said bond be, and the same is, hereby approved, and that further proceedings under said final decree be, and the same are, hereby stayed pending said appeal.

WILLIS VAN DEVANTER, *Judge.*

Dated July 10, 1909.

(Endorsed:) United States Circuit Court of Appeals, Eighth Circuit. No. 2927. United States, Appellant, vs. Edward L. Warren, Appellee. Order allowing Appeal to Edward L. Warren. Filed Jul- 13, 1909, John D. Jordan, Clerk.

(*Citation on Appeal of Edward L. Warren in Cause No. 2927.*)

And on the thirteenth day of July, A. D. 1909, a citation on the appeal of Edward L. Warren was filed in cause No. 2927, the original of which, with admission of service endorsed thereon, is hereto attached and herewith returned:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2927.

UNITED STATES, Appellant,
vs.
EDWARD L. WARREN, Appellee.

Citation.

UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be at the Supreme Court of the United States at Washington, on the 9th day of August, A. D. 1909, pursuant to an order granting an appeal from a final decree filed in the office of the Clerk of the United States Court of Appeals for the Eighth Circuit, wherein Edward L. Warren is appellant, and you are appellee, to show cause, if any there be, why the final decree mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Willis Van Devanter, one of the judges of the Circuit Court of the United States, for the Eighth Circuit, this 10 day of July, in the year of our Lord one thousand nine hundred and nine.

WILLIS VAN DEVANTER,
Circuit Judge.

Service of the above citation admitted this 10th day of July, 1909.
CHAS. C. HAUPT,
United States Attorney and
Solicitor for United States.

[Endorsed:] United States Circuit Court of Appeals, Eighth Circuit. No. 2927. United States, Appellant, vs. Edward L. Warren, Appellee. Citation on appeal of Edward L. Warren. Filed Jul- 13, 1909. John D. Jordan, clerk. George B. Edgerton, Attorney for Appellant, Edward L. Warren, 302 Nat'l German American Bank Bldg., St. Paul, Minn.

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said United States Circuit Court of Appeals for the Eighth Circuit, in

certain causes in said Court wherein the United States is Appellant and Annie Fairbanks, a minor, by Benjamin Fairbanks, her Guardian ad litem, is Appellee, No. 2926, and wherein the United States is Appellant and Edward L. Warren is Appellee, No. 2927, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the original citation in each case, with the admission of service endorsed thereon, is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-third day of July, A. D. 1909.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 21,792. U. S. Circuit Court of Appeals, 8th Circuit. Term No. 566. Annie Fairbanks, a minor, by her guardian ad litem, Benjamin L. Fairbanks, appellant, vs. The United States. File No. 21,793. Term No. 567. Edward L. Warren, appellant, vs. The United States. Filed August 10, 1909. File Nos. 21,792 and 21,793.

Supreme Court of the United States.

(21,792 and 21,793.)

OCTOBER TERM, 1909.

No. 566.

ANNIE FAIRBANKS, a minor, by her guardian ad litem, BENJAMIN L. FAIRBANKS,

Appellant,

vs.

THE UNITED STATES.

No. 567.

EDWARD L. WARREN,

Appellant,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANTS.

Each of these actions was brought against the United States to compel the allotment to plaintiff, of eighty acres of land, situate within the White Earth Reservation, Minnesota.

The plaintiffs, Chippewa Indians residing on such reservation, one a minor, the other an adult, each claimed the right to such allotment, under the provisions of the treaty with the Chippewa Indians, proclaimed April 18, 1867, and, the several acts of Congress relating to such Indians on the White Earth Reservation.

The Government claims, that two minor children of Samuel Mooers, also Chippewa Indians residing with their father on such reservation, have been justly allotted the lands so sought by plaintiffs, on account of a prior and superior equity of such minor children under the provisions of such treaty and, such acts.

The two actions commenced in June, 1907, in the United States Circuit Court, Eighth Circuit, District, Minnesota, were by consent tried together, and a decree was there entered, in each case, for the plaintiff in accordance with the prayer of the complainant.

The judgment of the Circuit Court was, in each case, reversed upon exceptions, by the Circuit Court of Appeals, and each cause was remanded with directions to dismiss the bill upon the merits.

From such decree of reversal each plaintiff has appealed to this Court, and prays the consent of this Honorable Court to present the two cases together.

STATEMENT.

These actions were brought under the act of Congress approved February 6, 1901, whereby authority is granted to, "All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper Circuit Court of the United States; and said Circuit Courts are hereby given jurisdiction to try and determine, 'such actions, suits or proceedings.'"

On June 29, 1904, the plaintiff Annie Fairbanks, then a minor fourteen years of age, through her father said Benjamin L. Fairbanks, applied at the White Earth Agency for an additional allotment of eighty acres of land in such Reservation. On June 30, 1904, the plaintiff Warren made a similar application. The plaintiff Fairbanks applied for the West ½ and the plaintiff Warren for the East ½ of the Northwest ¼, Sec. 15, Twp. 142, R. 39. Such applications were made under the Steenerson Act approved April 28, 1904, and the land applied for was, in each case, *pine land.*

Transcript of record, pages 34, 126, 132.

Each of such applications was refused, by the agent in charge, for the reason that under the instructions which he had received from the Department of the Interior he was not yet ready to make allotments under the Steenerson Act.

Transcript of record, pages 46-48,127,128.

Simon Michelet, the agent, testified:

> "I was informed by one of the clerks in the office that the allotments applied for by Mooers were solid pine allotments and that was our principal reason for canceling them; I had no other reason for canceling them, but that is what caused me to do it, but I had another reason and that was that Mr. Mooers had one hundred sixty acres of vacant land adjoining or close to his farm down there fenced in and was using the same, and the agency plat showed that those two eighties were being held for Mr. Mooers to be taken as allotments for those children."

Transcript of record, page 44.

On August 8, 1904, Lewis and Alice Mooers, aged four and six years respectively, made application, through their father Samuel Mooers, for an original allotment of eighty acres of land each, under the Act of Congress approved January 14, 1889.

Mooers selected for his son Lewis the same eighty applied for by Annie Fairbanks; and, for Alice, the same eighty applied for by Warren.

In each application signed by Mooers for his children, it was stated, that the land selected *was not pine land.* The applications for the Mooers children were made, while the Indian Agent was absent, and, to a clerk in charge of the office at the time.

The clerk received the applications and made the allotments as far as he could.

Transcript of record, pages 64, 103, 130, 131.

Shortly after August 8, 1904, the Indian Agent, discovering the action of his clerk, and, learning that the lands selected by Mooers for his children were pine lands, directed his clerk to cancel such allotments and to notify Mooers of such cancellation.

Transcript of record, pages 45, 70.

The clerk of the Indian Agent accordingly cancelled the allotments to the Mooers children; and, in October following, such clerk wrote a letter to Samuel Mooers, father of such children, informing him that such allotments had been cancelled by order of the Indian Agent. Mooers received such letter the last of October or first of November, 1904.

Transcript of record, pages 85, 86.

On April 24, 1905, the allotments were commenced at White Earth Agency, under the Steenerson Act. On such date, the plaintiffs respectively made application and were allotted the lands for which they had applied on June 29 and 30, 1904.

Transcript of record, pages 38, 39, 130, 132.

On May 15, 1905, original allotments, of eighty acres each, were made to Alice and Lewis Mooers, respectively, on the application of their father Samuel Mooers under the act of January 14, 1889.

Transcript of record, pages 54, 139, 140.

On May 17, 1905, additional allotments of eighty acres each, were made to Alice and Lewis Mooers, respectively, under the Steenerson Act, on application of their father.

Transcript of record, pages 54, 140, 141.

In January, 1906, Samuel Mooers, in behalf of his two minor children Alice and Lewis, protested to the Land Department against the action of the Indian Agency at White Earth Agency in canceling the allotments made to Mooers children, August 8, 1904.

Transcript of record, page 88.

On March 31, 1906, the Commissioner of the Land Office addressed a letter to the Indian Agency at White Earth Reservation, directing the Agent, "To allot to Mr. Mooers children the lands originally granted to them; viz., to Alice the E. ½ of the N. W. ¼ of Sec. 15, Twp. 142, R. 39, and to Lewis the W½ of the N. W. ¼ of said section."

Transcript of record, pages 40, 133, 134.

Thereupon the Indian Agent at White Earth wrote the Land Department and requested an investigation in reference to the controversy between the Mooers children and the plaintiffs herein.

The Secretary of the Interior appointed one Frank C. Churchill as an inspector.

Mr. Churchill went to the White Earth Agency, made an investigation, in which he took testimony on both sides, and, reported the result of his investigation to the Secretary of the Interior.

After examining the report of inspector Churchill, and, on June 29, 1906, the Hon. E. A. Hitchcock, Secretary of the Interior addressed a letter to the Commissioner of Indian Affairs, in which he quoted from the report of inspector Churchill concerning his investigation of those two allotments to Fairbanks and Warren, and the prior allotments of the same land to the Mooers children, and finally gave the inspector's opinion, "That Mr. Mooers has had his day in court, so to speak; that he has been treated fairly and has no real cause for complaint, * * * the allotments to Edward L. Warren and Annie Fairbanks should stand as made."

Transcript of record, pages 135-137, 145-151.

Upon receipt of such letter from the Secretary of the Interior, and, on July 13, 1906, the Land Department, by C. F. Larabee acting commissioner, forwarded to the Indian Agent at White Earth a copy of the letter of Secretary Hitchcock together with a letter from the Land Department to such Indian Agent, in which letter was the following direction:

> "You will disregard the instructions given you in office letter of March 31, 1906, to cancel the additional allotments made to Edward L. Warren and Annie Fairbanks." * * *
>
> "These additional allotments will therefore stand as made, and you will allot other suitable lands to the children of Samuel E. Mooers.
>
> "You are requested to inform all of the parties in interest of this ruling."

Transcript of record, pages 134, 135.

Thereafter and prior to May 13, 1907, Samuel Mooers, in behalf of his two minor children Lewis

and Alice, made an *ex parte* appeal from the decision of Secretary Hitchcock to Secretary Garfield. No notice was given to Annie Fairbanks or Edward L. Warren or to their agents or attorneys, or to the father of Annie Fairbanks of such appeal, and they had no knowledge of such appeal until just before the commencement of these actions.

Transcript of record, pages 61, 78, 80, 152, 155.

On May 13, 1907, Secretary Garfield addressed a letter to the Commissioner of Indian Affairs, in which he overruled the decision of his predecessor Secretary Hitchcock, and directed the Commissioner of the Land Office to re-allot to Alice J. and Lewis D. Mooers the lands in question, and to cancel the allotments of such lands to Annie Fairbanks and Edward L. Warren.

And thereupon these actions were brought.

TREATIES AND ACTS OF CONGRESS.

The provisions of such treaty, and, of such acts of Congress, material to the present controversy are as follows:

"Treaty with the Chippewa of the Mississippi, proclaimed April 18, 1867.

"Article 7. As soon as the location of the reservation * * * shall have been approximately ascertained * * * the Secretary of the Interior shall cause the same to be surveyed * * * and whenever, after such survey, any Indian, * * * shall have ten acres of land under cultivation, such

Indian shall be entitled to receive a certificate, showing him to be entitled to the forty acres of land, * * * containing the said ten acres * * * and whenever such Indian shall have a certificate for additional ten acres under cultivation, he or she shall be entitled to an additional forty acres, and so on, until the full amount of one hundred sixty acres may have been certified to any one Indian." * * *

Act of February 8, 1887, "An act to provide for the allotment of lands in severalty to Indians on the various reservations." * * *

"Be it enacted, etc.

"Sec. 1. That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order, setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation, or any part thereof, of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed or resurveyed, if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

"To each head of a family, one-quarter of a section;

"To each single person over eighteen years of age, one-eighth of a section;

"To each orphan child under eighteen years of age, one-eighth of a section; and

"To each other single person under eighteen years (of age) now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-*sixteenth of a section;*

"PROVIDED, That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act; and,

"PROVIDED FURTHER, That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty and act." * * *

"Sec. 2. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection." * * *

"Act, approved February 28, 1891, 'An act to amend and further extend the benefits of the act approved February 8, 1887,' entitled 'An act to pro-

vide for the allotment * * * and for other purposes.'"

"Be it enacted * * * that Section 1 of the act * * * approved February 8, 1887, be, and the same is hereby amended so as to read as follows:

"Sec. 1. That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an Act of Congress or Executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation, or any part thereof, of such Indians is advantageous for agricultural or grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed, if necessary, and to allot to each Indian located thereon one-eighth of a section of land:

"PROVIDED, That in case there is not sufficient land in any of said reservations to allot lands to each individual in quantity as above provided, the land in such reservation or reservations shall be allotted to each individual pro rata as near as may be, according to legal subdivisions: Provided further * * *."

Act approved January 14, 1889: "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota."

Sec. 1. provides:

(a) That the President within sixty days designate and appoint three commissioners to negotiate

with all the different bands of Chippewa Indians in the state of Minnesota for the cession and relinquishment, in writing, of all their title in and to all the reservations of said Indians in Minnesota, except White Earth and Red Lake, and to all of these two which may not be required to fill the allotments required by this and existing acts.

(b) The manner of assent by the Indians.

(c) The approval of the President necessary before binding.

(d) The manner of taking the census of the tribes.

Sec. 2 provides for the bond, oath and pay of such commissioners.

Sec. 3 provides for the removal to White Earth Reservation of all but Red Lake Indians and allotments to such Indians on White Earth Reservation, under the direction of such commissioners.

"Sec. 4. That as soon as the cession and relinquishment of said Indian title has been obtained and approved as aforesaid, it shall be the duty of the Commissioners of the General Land Office to cause the lands so ceded to the United States to be surveyed in the manner provided by law for the survey of public lands, and as soon as practicable after such survey has been made, and the report, field notes and plats thereof filed in the General Land Office, and duly approved by the Commissioner thereof, the said Secretary of the Interior, upon notice of the completion of such surveys, shall

appoint a sufficient number of competent and experienced examiners, in order that the work may be done within a reasonable time, who shall go upon said lands thus surveyed and personally make a careful, complete, and thorough examination of the same by forty acre lots, for the purpose of ascertaining on which lots or tracts there is standing or growing pine timber, which tracts on which pine timber is standing or growing for the purposes of this act shall be termed *pine lands*, the minutes of such examination to be at the time entered in books provided for that purpose, showing with particularity the amount and quality of all pine timber standing or growing on any lot or tract, the amount of such pine timber to be estimated by feet in the manner usual in estimating such timber, which estimates and reports of all such examinations shall be filed with the Commissioner of the General Land Office as a part of the permanent records thereof, and thereupon that officer shall cause to be made a list of all of such pine lands, describing each forty acre lot or tract thereof separately, and opposite each such description he shall place the actual cash value of the same, according to his best judgment and information, but such valuation shall not be at a rate of less than three dollars per thousand feet, board measure of the pine timber thereon, and thereupon such lists of lands so appraisd shall be transmitted to the Secretary of the Interior for approval, modification or rejection, as he may deem proper. * * * *All other lands acquired from the said Indians on*

said reservations other than pine lands are for the purposes of this act termed agricultural lands."

Sec. 5 provides that after the survey, examination and appraisals of said pine lands, they shall be *proclaimed* as in *market* and *offered* for *sale* in *forty acre parcels*, and, in no event shall any parcel be sold for a less sum than its appraised value.

Sec. 6 provides for the disposal by the United States to actual settlers *only*, under the provisions of the homestead law, any agricultural lands, not allotted or reserved for the further use of said Indians, at the rate of $1.25 an acre.

Sec. 7 provides that the moneys received from the *sale* of *such pine lands and such agricultural lands* shall be paid into the United States Treasury to be held in trust for the term of fifty years, interest thereon to be paid to such Indians annually at the rate of five per cent, and whenever such sum shall exceed three million dollars, the expenses of these various surveys and all expenses connected with the cession and relinquishment shall be paid to the United States out of such excess.

The act approved February 26, 1896, is an amendment of Sec. 5 of the act of January 14, 1889, as to the manner and method of the sale of such pine lands, *only*.

Act of June 10, 1896, is also an amendment of Act of January 14, 1889, reducing the number of Commissioners from *three* to *one*..

The act of June 27, 1902, amends the act approved January 14, 1889, by simply changing the man-

ner of estimating the timber on such pine lands, and, the method of sale of such pine timber, with the following provision added to Section 5 of such Act of 1889.

"Sec. 5. That the Secretary of the Interior shall proceed as speedily as practicable to complete the allotments to the Indians, *which allotments shall be completed before opening the agricultural land to settlement.*

Act of April 28, 1904, "An act to provide allotments to Indians on White Earth Reservation in Minnesota."

"Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled. That the President of the United States be, and he is hereby, authorized to allot to each Chippewa Indian now legally residing upon the White Earth Reservation under treaty or laws of the United States, in accordance with the express promise made to them by the Commissioners appointed under the Act of Congress entitled: 'An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota,' approved January 14, 1889, and to those Indians who may remove to said reservation who are entitled to take an allotment under Article 7 of the treaty of April 18, 1867, between the United States and the Chippewa Indians of the Mississippi, one hundred sixty acres of land; and said allotments shall be, and the patents issued therefor, in the manner and having the same effect as provided in the general allotment Act, 'An act to amend and further extend the

benefits of the Act approved February 8, 1887, entitled: 'An Act to provide for the allotment of land in severalty to Indians on the various reservations and extend the protection of the Commissioners of the United States over the Indians, and for other purposes,'" approved February 28, 1891.

"PROVIDED, That where any allotment of less than one hundred and sixty acres has heretofore been made, the allottee shall be allowed to take an additional allotment, which, together with the land already allotted shall not exceed one hundred sixty acres; and,

"PROVIDED FURTHER, That if there is not sufficient land in said White Earth (diminished) Reservation subject to allotment each Indian entitled to allotments under the provisions of this Act shall receive a pro rata allotment."

ASSIGNMENT OF ERRORS.

The Circuit Court of Appeals erred:

1. In not affirming the judgment of the Circuit Court.

2. In reversing the decrees of the Circuit Court, with directions to enter decrees dismissing the bills upon the merits.

3. In holding that the Mooers children had the right to take an original allotment of land on the White Earth Reservation under the Acts of February 8, 1887, and January 14, 1889.

4. In holding that the rule of the Land Department excluding pine timber from allotment to Chippewa Indians on the White Earth Reservation under the acts of February 8, 1887, and January 14, 1889, was illegal and void.

5. In holding that the Steenerson Act of April 28, 1904, enlarged the provision of the Acts of February 8, 1887, and January 14, 1889.

6. In holding that the allotments to the Mooers children in 1904 by the United States Indian Agent, were valid, because no one had a right to make the allotments under the Act of January 14, 1889, except the Commissioner appointed under and pursuant to the Act of January 14, 1889.

7. In holding that the Steenerson Act revoked the rules of the Land Department in excluding pine timber land from the original allotments under the acts of February 8, 1887, and January 14, 1889.

8. In holding that the Steenerson Act gave any additional rights of allotment under the acts of February 8, 1887, and January 14, 1889.

9. In holding that the children of Mooers, by the Application of August 8, 1904, obtained any priority in equity over said Edward L. Warren and Annie Fairbanks.

10. In holding that in the absence of the applications for allotments, the fencing in of the lands gave the children no right or claim thereto, and that their right to allotments must be determined by the proceedings which they took in the Land

Office, and their applications for the land herein involved are the only proceedings of that character on their behalf.

11. In not holding that by the improvement of other lands upon the White Earth Reservation with intent to select them for his minor children, Samuel Mooers waived any rights to the lands in controversy, and is now estopped to claim them for his minor children.

12. In not holding that Samuel Mooers in selecting other lands for his minor children in May, 1907, in lieu of the lands in controversy, was estopped from claiming the lands involved in this litigation for his said minor children.

13. In not holding that Plaintiff's Exhibit 14, found on pages 134 and 135 of the transcript of record, being the decision of the acting Commissioner of Indian Affairs, under date of July 13, 1906, was final. The said decision held that the additional allotments to Warren and Annie Fairbanks should stand as made. This assignment of error is based upon the fact that no notice of appeal or review was given to Warren or Annie Fairbanks or their attorney.

POINTS AND AUTHORITIES.

I.

A binding condition and an essential part of the consideration for the cession and relinquishment of the title and interest to their lands, by the Chippewa Indians, to the United States under the Act of January 14, 1889, was, that *no pine land* should be allotted to any of such Indians, but, that all the pine lands should be sold, and the moneys arising from such sales, should be paid into the United States Treasury to be held in trust and draw interest at the rate of five per cent per annum for the period of fifty years, for the benefit of all of such Indians.

II.

The Act of February 28, 1891, was an amendment of Section 3, Act of January 14, 1889, in so far as the provisions of such Section 3 related to Section 1, Act of February 8, 1887.

III.

As Lewis and Alice Mooers, on August 8, 1904, were only four and six years of age, respectively (T. R. pp. 12, 27, 139, 145), they were neither of them entitled to an original allotment of eighty acres of land on White Earth Reservation.

Acts of Congress, *supra;* February 8, 1887; February 28, 1891; January 14, 1889; June 27, 1902.

IV.

On August 8, 1904, neither Lewis nor Alice Mooers had any greater equity or right to an original allotment of eighty acres of pine land on White Earth Reservation than each of plaintiffs had to an additional allotment of eighty acres of pine land on such reservation on June 29 and 30, 1904.

Acts of Congress, *supra;* Woodbury v. United States, 170 Fed. 302.

V.

Under the Acts of Congress, *supra;* February 8, 1887; February 28, 1891; January 14, 1889; June 27, 1902, no Chippewa Indian was entitled to an allotment of pine land on White Earth Reservation.

VI.

Under the several Acts of Congress, *supra*, mentioned in point V, the Secretary of the Interior had no authority to allot pine lands on White Earth Reservation to Lewis and Alice Mooers, or, to any Chippewa Indian. Garfield v. Goldby, 211 U. S. 249.

VII.

Until April 24, 1905, no Chippewa Indian was entitled to an allotment of pine land on the White Earth Reservation.

Acts of Congress, *supra*, Woodbury v. United States, 170 Fed. 302.

VIII.

By the provision of the Steenerson Act it was not the intention of Congress to give any preference to any of the Chippewa Indians to an allotment of pine land either as an original or as an additional allotment.

IX.

If there was any prior equity obtainable by application for an allotment of pine land on White Earth Reservation, prior to April 24, 1905, as between the plaintiffs and the Mooers children, that prior equity was obtained by the plaintiffs Annie Fairbanks and Edward L. Warren, by filing their applications, respectively, on June 29 and 30, 1904.

X.

If, under the Steenerson Act, resident Chippewa Indians were entitled to allotments of pine lands on White Earth Reservation, by conforming to the notice and direction of the Indian Agent at White Earth Agency acting under the direction of the Secretary of the Interior, the application of the plaintiffs and the allotments made to them thereunder, on April 24, 1905, should stand.

XI.

The order made on July 13, 1906, by C. F. Larrabee, acting Commissioner of ~~the Land Department~~ Indian, in which order such acting Commissioner directed that the allotments made to the plaintiffs on April 28, 1904, of the lands in controversy in

these suits should stand as made, was, in effect the final order of Hon. E. A. Hitchcock, Secretary of the Interior, after a full hearing had, at which hearing all the parties interested were represented and took part.

XII.

The Secretary of the Interior can not legally, on an *ex parte* hearing set aside and overrule a final order made by the Land Commissioner in a controversy in which a full hearing was had and all parties interested took part.

Garfield v. Goldby, 211 U. S. 249; Hawley v. Diller, 178 U. S. 476, 489; Sanford v. Sanford, 139 U. S. 642.

XIII.

The rule of the Land Department excluding pine land from allotment under the Acts of February 8, 1887; February 28, 1891; January 14, 1889, was a correct interpretation of such Acts of Congress.

XIV.

The Stenerson Act did not revoke the rule of the Land Department in excluding pine lands from allotment under the Acts of February 8, 1887; January 14, 1889, and February 28, 1891.

XV.

Since the order of Secretary Garfield overruling the order of the acting Commissioner of the Land Department was made *ex parte* on a mere question of law, it is properly before this Court for determination. Garfield v. Goldby, 211 U. S. 249.

XVI.

By fencing in, pasturing, holding in reserve and notifying the Agency that he held in reserve two other eighties of land than those in controversy for his two minor children Lewis and Alice, Samuel Mooers is estopped from applying for the lands in controversy for such minors.

By applying for and receiving both original and additional allotments for his two minor children Lewis and Alice, on White Earth Reservation on May 15 and 17, 1905, Samuel Mooers waived any right to appeal from the order of acting Commissioner Larrabee in directing that the allotments made to the plaintiffs April 24, 1905, of the lands in controversy should stand.

ARGUMENT.

Decree of Circuit Court.

The decree of the Circuit Court, in favor of the plaintiffs, according to the opinion rendered, was based upon two grounds:

(a) Under the acts of February 8, 1887; January 14, 1889; and February 28, 1891, the Mooers children, on account of their age, were not entitled to any allotments on the White Earth Reservation.

(b) As under the Steenerson Act allotments did not commence until April 24, 1905, and the plaintiffs by conforming to the rules adopted by the Agency, made under the directions of the Secretary of the Interior, were duly allotted the lands

in question on such date, such allotments should stand.

Transcript of record, pages 159-163.

The Decree of the Circuit Court of Appeals.

The decree of the Circuit Court of Appeals in reversing the decree of the Circuit Court was based upon the three following grounds:

(a) The Mooers children were entitled to original allotments under such Acts of 1887 and 1889.

(b) Because such Acts of 1887 and 1889 were confined to lands which were advantageous for agricultural and grazing purposes only, and, the Department had construed such Acts as not including pine lands, the Steenerson Act abrogated this rule of the Department, and, left all the lands the same as though the rule had never been in effect.

(c) Therefore, the Mooers children had the right to such allotments on August 8, 1904, the date of their applications.

Transcript of record, pages 179-183.

Letter of Secretary Garfield.

Secretary of the Interior Garfield in his letter, or decision, on the *ex parte* appeal of Mooers, overruling the order of acting Commissioner Larrabee, among other things says:

"It is true that in the early work of the Chippewa Commission in making allotments on the White Earth Reservation the Office did direct that only agricultural lands should be allotted, reserving the pine lands for the common benefit of all of the

Indians of the reservation; but after the passage of the Steenerson Act which contemplated the allotment of all the lands of the reservation, such instructions necessarily could have no application." (T. R. p. 153.) * * *

"The Inspector in his report favorable to Fairbanks and Warren took no notice whatever of the fact that the allotments made to the Mooers children August 8, 1904, were original allotments under the Act of 1889, but he treated them as having been applicants on that date for additional allotments under the Steenerson Act. This may have been due to the statement of the Indian Agent in his testimony that he told Mooers, 'That I could not reserve any lands for anyone, and that he would have to take his chances the same as other Indians entitled to allotments.' This undoubtedly referred to the plan of making additional allotments under the Steenerson Act, although the Indian Agent subsequently testified, that the reason for his telling Mooers he could not have the lands allotted to his children August 8, 1904, was that they were pine lands."

In other words, Secretary of the Interior Garfield held:

(a) The excluding of pine lands from allotment on White Earth Reservation originated in a rule of the Land Department.

(b) The passage of the Steenerson Act abrogated the rule of the Department excluding pine lands from allotment.

(c) The allotments to Mooers children on August 8, 1904, were legally made under the Act of Congress, January 14, 1889.

In view of the premises, it is thus readily seen, that the ultimate questions decisive of this controversy are:

1. Were the Mooers children entitled to an original allotment of pine lands on White Earth Reservation under the Acts of Congress prior to the Steenerson Act?

2. If the Mooers children were not entitled to original allotments of pine lands on White Earth Reservation under the Acts of Congress prior to the Steenerson Act, did the Steenerson Act, the Act of Congress approved April 28, 1904, enlarge the rights of the Mooers children under prior acts and so authorize allotments to them on August 8, 1904?

To correctly solve these two questions, will involve the following propositions of law, which will be discussed in the order stated:

A. The Mooers children, Lewis and Alice, were neither of them entitled to an original allotment of eighty acres of land under the Acts of Congress approved February 8, 1887; January 14, 1889, and February 28, 1891.

B. The Act of Congress approved February 8, 1887, as amended by the Act of February 28, 1891, and the Act approved January 14, 1889, excluded pine lands from allotment on White Earth Reservation.

C. Under such Acts of Congress, viz., February 8, 1887, January 14, 1889, and February 28, 1891, the Secretary of the Interior not only had no authority to make allotments of pine land but was prohibited, from making any allotments of pine land to Chippewa Indians on White Earth Reservation.

D. The Steenerson Act did not change or modify the prior acts of Congress in such a way as to give a preference to any of the Chippewas to take allotments of pine lands.

E. The action of Secretary of the Interior Garfield in overruling the order of Land Commissioner Larrabee, "directing that the allotments of the lands in controversy to plaintiffs on April 24, 1905, should stand," was *ultra vires*, and beyond the scope of his authority, and hence subject to review by the Courts.

F. Inasmuch as such action of the Secretary of the Interior arose on an *ex parte* appeal and was based upon an erroneous construction of the Acts of Congress, the judgment of the Court in these actions should be final, notwithstanding the Mooers children were not designated as parties.

G. The plaintiffs are entitled to the allotments of the lands in controversy under the Steenerson Act.

A.

The Mooers children, Lewis and Alice, were neither of them entitled to an original allotment of eighty acres of land under the Acts of Congress

approved February 8, 1887; *January* 14, 1889, *and February* 28, 1891.

1. The age of Lewis Mooers is admitted by the reply of Annie Fairbanks to be seven years in September, 1907. The age of Alice Mooers is admitted by the reply of Warren to be nine years in September, 1907.

Transcript of record, pages 13, 27.

These two admissions are proven by the applications, and, the testimony of Samuel Mooers in Plaintiff's Exhibit 22.

Transcript of record, pages 130, 131, 145.

The ages of the Mooers children then were four and six years respectively, August 8, 1904.

2. Judge Amidon speaking for the Court, in the decision of the Circuit Court of Appeals, said: "The trial court, however, ascertained from their applications that the children were respectively seven and nine years of age, and reached the conclusion that since they must have been born subsequent to the date on which the Acts of 1887 and 1889 took effect, they could not be entitled to allotments under those statutes. This was the principal ground of its decision adjudging their allotments to be void. We find nothing in the statutes to support such a holding. The original Act of 1889 fixes no definite time for the making of allotments. The first section looks to an indefinite period. It begins as follows: "That in all cases where any tribe or band of Indians has been, *or shall hereafter be* located upon any reservation created for

their use, * * * the President of the United States be, and, he is hereby authorized, *whenever* in his opinion any reservation or any part thereof, of such Indians, is advantageous for agricultural and grazing purposes, * * * to allot the land in said reservation in severalty *to any Indians located thereon.*" "In specifying the amount to go to the different classes of allottees, the statute uses this language:

"To each other single person under eighteen years, now living or who may be born prior to the date of the order of the President, directing an allotment of the lands embraced in any reservation."

"The evidence in this case does not show the date of the order of the President directing that allotments be made under this statute. In our judgment, however, the making of one order did not exhaust the powers of the President. The statute vests a continuing power, and he could direct from time to time for allotments in favor of those born upon the reservation dealing with the subject, so long as there were lands of the reservation which had not been allotted. The statute submits the whole subject of the distribution of the lands embraced in the reservation, to the President, acting through the Interior Department."

This view of the Court of Appeals is clearly erroneous.

The quotation by Judge Amidon is not from the Act of 1889, but is from Section 1 of the Act of February 8, 1887.

The Act of January 14, 1889, is a special act, and, in effect is a treaty, by which the Chippewas of the Mississippi ceded and relinquished to the United States, all their title and interest to their reservations in Minnesota, except White Earth and Red Lake, for the consideration and conditions stated in such acts.

By the provisions of the Act of 1889 the allotment of land on the White Earth Reservation is taken from the President and placed in the hands of the three commissioners provided for in that act. Sec. 3, Act. 1889.

Again, Section 1, of the Act of February 8, 1887, was amended by the Act of February 28, 1891.

By the amendment the language quoted: "To each other single person under eighteen years, now living or who may be born prior to the date of the order of the President, directing the allotment of the lands embraced in any reservation, etc.," is omitted. That is, since the amendment of February 28, 1891, there is no such provision in the law. Hence, the Circuit Court of Appeals was in error in relying upon that provision.

But, without the amendment, and, under the provision as it existed in the Act of 1887 neither of these children would be entitled to an allotment of eighty acres of land, for the whole provision reads as follows:

"To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President, directing an allotment of the lands embraced in any reserva-

tion, *one-sixteenth of a section.*" So taking the section as it originally read, without the amendment, and the allotment of eighty acres of land would be clearly wrong.

However, from the time of the passage of the Act of February 28, 1891, the Land Department has treated the Act of February 28, 1891, as amending Section 1 of the Act of 1887. By such amendment the classification found in the Act of February 8, 1887, is entirely omitted and the language is: "To each Indian located thereon one-eighth of a section of land."

It is thus clearly seen that under the provisions of 1887 and 1891 the Mooers children were not entitled to any allotment on White Earth Reservation.

For, under the original Act of 1887 a single Chippewa Indian other than an orphan child under eighteen years of age, was only entitled to forty acres of land. Under the Act of 1887 as amended by the Act of 1891, only those located on such reservation at the time of the amendment were entitled to any allotment of land.

B.

The Act of Congress approved February 8, 1887, as amended by the Act of February 28, 1891. and the Act approved January 14, 1889, excluded pine lands from allotment on White Earth Reservation.

Repeating what has been said on a prior page:

The Act of January 14, 1889, was in effect a treaty by which the Chippewas of the Mississippi

ceded and relinquished to the United States all the title and interest of such Indians to their lands in Minnesota, except the White Earth and Red Lake Reservations, and to so much of each of those reservations as was not needed for the purposes of the various acts of Congress.

A binding condition and an essential part of the consideration, for the cession and relinquishment of the title and interest to their lands, by the Chippewa Indians, to the United States under the Act of January 14, 1889, was that no pine lands should be allotted to any of such Indians, but, *that all the pine lands should be sold*, and the moneys arising from such sales, should be paid into the United States Treasury to be held in trust and draw interest at the rate of five per cent per annum for the period of fifty years for the benefit of all such Indians.

Section 4 of such Act of 1889 provides:

1. For the survey of all such ceded lands.

2. The examination of such lands by forty acre tracts to determine upon which tracts pine timber is growing.

3. That for the purposes of such act the lands upon which pine timber is growing shall be denominated "pine lands" and all the other ceded lands, "agricultural lands."

4. That a careful estimate of the quantity and quality of all the pine timber standing upon each forty acre tract shall be made.

5. That the value of each forty acre tract of pine land shall be determined at not less than three dollars per housand feet, board measure, of the pine timber thereon.

Section 5 provides, that after the survey, examination and appraisal of said pine lands have been fully completed, they shall be proclaimed as in market and offered for sale in the manner therein provided.

That such lands shall be sold to the highest bidder in forty acre tracts, but at not less than the appraised value.

Section 7 provides, that all moneys accruing from the disposal of said lands shall be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the state of Minnesota as a permanent fund which shall draw interest at the rate of five per cent per annum payable annually for the period of fifty years, etc.

It seems *idle* to say, that, in the face of these provisions of such Act, by which the United States obtained the cession and relinquishment of the title of the Chippewa Indians to these lands, any other disposition can be made of the pine lands than that disposition provided for in such Act and by the other subsequent Acts of Congress. Certainly, it would seem that the Secretary of the Interior may not as the head of such Department do anything in violation of such acts of Congress.

Then, "the act of Congress approved February 8, 1887, *as amended by the act of February* 28, 1891,

and the act approved January 14, 1889, *excluded pine lands from allotment on White Earth Reservation."*

C.

Under such Acts of Congress, viz., February 8, 1887, *January* 14, 1889, *and February* 28, 1891, *the Secretary of the Interior not only had no authority to make allotments of pine land but was prohibited from making any allotments of pine land to Chippewa Indians on White Earth Reservation.*

See United States v. Carpenter, 111 U. S. 347.

"A treaty with the Indians must be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

Jones v. Meehan, 175 U. S. 1.

"The court will construe a treaty with the Indians as that unlettered people understood it, and as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection; and will counterpoise the inequality by the superior justice which looks only to the substance of the right, without regard to technical rules." United .States v. Winans, 198 U. S. 371.

"A resolution by the Senate changing the terms of an Indian treaty can not be construed a part of it, when it was not published with the treaty, or brought to the attention of the Indian tribes, or

approved by the President." New York Indians v. United States, 170 U. S. 1.

"The obvious, palpable meaning of the words of an Indian treaty may not be disregarded because of the dependent character of the Indians, or because, in the judgment of the Court, the Indians may have been over reached." United States v. Chochtaw Nation, 179 U. S. 494.

It is possible that Congress itself has the power to violate the conditions of this treaty, or the Act of January 14, 1889, but it is believed that the head of a Department may not do this.

United States v. Carpenter, 111 U. S. 347.

But the case of Garfield v. Goldby, 211 U. S. 249, seems conclusive of this proposition.

In that case the Secretary of the Interior, wholly without authority of law summarily erased from the approved rolls of citizenship in the Chochtaw and Chickasaw Nations the name of one who had received an allotment certificate and was in possession of the land, and, *mandamus* was brought to compel the Secretary of the Interior to undo his action.

Mr. Justice Day, speaking for the court in that case on page 261 said:

"In our view, this case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the acts of Congress. We apperciate fully the purpose of Congress in numerous acts of legislation to confer

authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this court have shown its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law. But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and, if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

The provisions of the act of January 14, 1889, are plain and simple scarcely open for construction.

The plain meaning of that Act, as must have been understood not only by the Chippewas but by the Commissioners acting for the Government, is, that no pine land should be allotted to any of the Indians, but that all the pine land should be sold as therein provided for the benefit of all the Indians.

D.

The Steenerson Act did not change or modify the prior acts of Congress in such a way as to give a preference to any of the Chippewas to take allotments of pine lands.

The Steenerson Act is in no way inconsistent with the provisions of the prior acts of Congress.

That is to say, the Steenerson Act does not necessarily amend the provisions of the Act of 1889

which excluded pine lands from allotment, if, there be enough agricultural land remaining, to make an allotment of one hundred sixty acres to each Indian entitled to an allotment.

For, the amendment, if there be one, is not by specific reference to the provisions of 1889, but, only by implication.

Again, the Steenerson Act authorizes the President to allot one hundred sixty acres of land on White Earth Reservation to *only two classes* of Indians.

1. To those legally residing upon such reservation under treaty or laws of the United States, in accordance with the express promise made to *them* by the *Commissioners* who negotiated for the Government, in obtaining the cession of such lands.

2. To those who may remove to such reservation, who are entitled to take an allotment under Article 7 of the treaty of 1867.

Under such treaty provision was made, that whenever any member of the tribe should have ten acres of land under cultivation, he should be entitled to a certificate granting to him the forty acres of which the tract under cultivation was a part; and that, for each additional ten acres so cultivated an additional tract of forty acres should be granted, until he should have received in all one hundred sixty acres.

In view of the premises, it is exceedingly difficult to read into the Stenerson Act, an *amendment* of the *Act* of 1889 *whereby pine lands were excluded from allotment.*

However, the Department of the Interior has construed the Steenerson Act as opening for allotment any and all lands upon White Earth Reservation and many allotments have been made thereunder, none of which have been questioned.

While the plaintiffs feel that such a construction of the Steenerson Act may be erroneous, nevertheless, they are not in a condition to question such construction in these actions, and do not.

However, the plaintiffs *do contend*, that the Steenerson Act does not change or modify the prior acts of Congress in such a way as to give a *preference* to any of the Chippewas to take allotments of pine lands.

After reading such act, the statement of this proposition seems almost like stating an axiom.

For, by the Acts of 1887, 1889 and 1891,

No pine lands could be allotted to Chippewa Indians on the lands ceded.

The pine lands were to be sold for the benefit of all of such Indians.

From 1889 up to the passage of the Steenerson Act, this was the law and under this law the major part of the Chippewas on White Earth Reservation took their allotments of agricultural lands. Would it be equitable at this late day for Congress to pass a law not only contrary to the terms of the treaty but in such a way as to give an undue preference to those who had simply neglected to take an allotment of agricultural lands, and in particular to those who are incapable of taking allotments under such acts, as is the case with the Mooers children.

The unfairness and lack of equity of such a provision is well illustrated in the instant cases.

It appears from the testimony of Major Michelet, the Indian Agent, that the eighty acres claimed by Annie Fairbanks contains nine hundred thousand feet of standing pine timber. That the eighty claimed by Warren contains seven hundred thousand feet of standing pine timber.

Transcript of record, pages 41, 42.

By the Act of 1889 pine lands were not to be sold at a less value than that of the standing pine timber at the rate of three dollars per thousand feet, board measure. That would make the Fairbanks eighty worth twenty-seven hundred dollars in 1889; and, the Warren eighty, twenty-one hundred dollars.

In 1905 when these lands were allotted the pine timber was worth at least four times as much as it was in 1889, so that in March, 1905, and April, 1905, when these lands were allotted to the plaintiffs the Annie Fairbanks' eighty was worth at least ten thousand eight hundred dollars, and, the Warren eighty, eight thousand four hundred dollars.

While it does not appear in the records what the value of the agricultural land open to allotment on such reservation was in 1905, we venture the assertion that it was not worth to exceed ten dollars an acre, which would make three eighties worth not to exceed eight hundred dollars each.

It is thus readily seen, that, if it was the intention of Congress to give this unfair preference to minor children not born until eleven years after the passage of the Act of 1887, they could get lands as an original allotment worth from ten to fourteen times as much as those who had been compelled to take the agricultural allotments in accordance with the Acts of Congress passed at the time they made the cession of their lands.

It seems certain that if Congress intended any such preference it would have been expressed in the Act itself in very positive terms.

Therefore, we think it is clearly established that the Steenerson Act did not change or modify the prior acts of Congress in such a way as to give a preference to any of the Chippewas to take allotments of pine lands.

Indeed, in Woodbury v. United States, *supra*, which case arose under the Steenerson Act, District Judge Amidon, speaking for the Court, on page 303, said:

"In November or December following, this matter was settled by the department, and the agent then renewed the work of preparing the rolls and computing the lands for execution of the act. *During all this time it is manifest that no application could be entertained from any member of the tribe for his selection of any specific tract, for two reasons:* (1) Such a practice would have given the applicant an unjust advantage over the other members of the tribe, and would have been contrary to the established custom of the department in such

cases. (2) Until the rights of the Otter Tail Band were determined, neither the number of Indians who were entitled to participate in the allotment, nor the amount of the individual allotments, could be known.'

E.

The action of Secretary of the Interior Carfield in overruling the order of Land Commissioner Larrabee, "directing that the allotments of the lands in controversy to plaintiff on April 24, 1905, *should stand," was ultra vires, and beyond the scope of his authority, and hence subject to review by the courts.*

Garfield v. Goldby, 211 U. S. 249; Hawley v. Diller, 178 U. S. 476; Sanford v. Sanford, 139 U. S. 642; United States v. Carpenter, 111 U. S. 347.

The case of Sanford v. Sanford, *supra*, arose on the action of the Commissioner of the General Land Office in allowing an amendment by a preemptioner of his original declaration so as to cover a different tract.

Mr. Justice Field rendered the decision of the Court in that case, and on page 647, speaking for the Court, he said:

"The conclusions of the Department are not even then open for review for alleged errors in passing upon the weight of evidence presented, for that would be to make a court of equity a court of appeal from its decisions, which was never contemplated.

"But where the matters determined are not properly before the Department, or its conclusions have been reached from a misconstruction, by its officers, of the law applicable to the cases before it, and it has thus denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting its judgment, then the courts can, in a proper proceeding, interfere and control its determination so as to secure the just rights of parties injuriously affected. Quinby v. Conlan, 104 U. S. 420, 426; Baldwin v. Stark, 107 U. S. 463, 465."

The case of Hawley v. Diller, *supra*, in which the opinion was delivered by Mr. Justice Harlan, on page 489, affirms the doctrine quoted from Sanford v. Sanford, *supra*.

In Garfield v. Goldby, *supra*, it was *held*, that *mandamus* is the proper remedy where the Secretary of the Interior wholly without authority of law, has summarily erased from the approved rolls of citizenship in the Chochtaw and Chickasaw Nations the name of one who has received an allotment certificate and is in the possession of the land.

Referring to the decision cited to sustain the writ of mandamus in that case, Mr. Justice Day speaking for the court on page 261, said: "We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the head of a Department, under any view that could be taken of the facts that were laid be-

fore him, was *ultra vires,* and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do." * * *

"In our view, this case resolves itself into a question of the power of the Secretary of the Interior in the premises as conferred by the acts of Congress."

F.

Inasmuch as such action of the Secretary of the Interior arose on an ex parte appeal, and was based upon an erroneous construction of the acts of Congress, the judgment of the court in these actions should be final, notwithstanding the Mooers children were not designated as parties.

It is contended that by complying with the rules and regulations of the Department the applications of the plaintiffs on April 24, 1905, under the Steenerson Act, and the allotments then made to them were legally made and the plaintiffs thereby obtained certain legal rights in the lands in question.

To deprive plaintiffs of the rights which they thus obtained on an *ex parte* proceeding where only a question of law was involved and award the rights to others, it would seem, would not entitle the others to a hearing, in a case where only a question of law arose, and the parties, by a proper construction of the law, had their rights restored to them.

For, if the action of the Secretary in ordering the allotments to the plaintiffs was contrary to law such action was void, and in this suit the court is asked, simply to *declare* the *ex parte* action of the Secretary of the Interior to be *ultra vires* and beyond the scope of his authority.

Referring again to the case of Garfield v. Goldby, *supra*, speaking of the instant question Mr. Justice Day in his opinion in that case on page 262, said: "In the extended discussion which has been had upon the meaning and extent of constitutional protection against action without due process of law, it has always been recognized that one who has acquired rights by an administrative or judicial proceeding can not be deprived of them without notice and opportunity to be heard."

"The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded, is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been question in this court."

Therefore, the judgment of this Court may restore to the plaintiffs rights of which they have been deprived without due *process* of law, and *that*, without making the Mooers children parties, since the Government as guardian has represented them.

G.

The plaintiffs are entitled to the allotments of the land in controversy, under the Steenerson Act.

1. The Mooers children were neither of them entitled to an original allotment under the Acts of 1887, 1889 and 1891.

2. Until April 24, 1905, no Chippewa Indian was entitled to an allotment of pine lands on White Earth Reservation.

3. The plaintiffs duly made their applications and were allotted the lands in controversy on April 24, 1905.

4. On July 13, 1906, after a thorough investigation, hearing and trial, in which all in interest took part, the acting Commissioner of the Land Department, with the approval of Secretary Garfield, determined the controversy in suit favorably to the plaintiffs.

5. The action of Secretary Garfield in the *ex parte* appeal should be disregarded.

Such action was *ultra vires*, and beyond the scope of his authority.

Because such action was *ultra vires* it was void, and such order may be set aside and full relief be given to the plaintiffs in these actions.

We submit, therefore, in conclusion, that neither of the Mooers children were entitled to an allotment of pine lands on White Earth Reservation under the Acts of February 8, 1887, January 14,

1889, February 28, 1891; that the plaintiffs are each entitled to the relief prayed for, and that the decree of the United States Circuit Court of Appeals should be reversed.

GEORGE B. EDGERTON,
Attorney for Appellants.

F. W. HOUGHTON,
Of Counsel,
Milwaukee, Wisconsin.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

ANNIE FAIRBANKS, A MINOR, BY HER guardian ad litem, Benjamin L. Fairbanks, appellant, *v.* THE UNITED STATES.	No. 112.
EDWARD L. WARREN, APPELLANT, *v.* THE UNITED STATES.	No. 113.

ON APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

The treaty of March 19, 1867, with the bands of Mississippi Chippewas, whereby the White Earth Indian Reservation was created, contained the following stipulations:

> ARTICLE VII. As soon as the location of the reservation set apart by the second article hereof shall have been approximately ascertained and reported to the Office of Indian

> Affairs, the Secretary of the Interior shall cause the same to be surveyed in conformity to the system of government surveys, and whenever, after such survey, any Indian, of the bands parties hereto, either male or female, shall have ten acres of land under cultivation, such Indian shall be entitled to receive a certificate, showing him to be entitled to the forty acres of land, according to legal subdivision, containing the said ten acres or the greater part thereof, and whenever such Indian shall have an additional ten acres under cultivation, he or she shall be entitled to a certificate for additional forty acres, and so on, until the full amount of one hundred and sixty acres may have been certified to any one Indian; and the land so held by any Indian shall be exempt from taxation and sale for debt, and shall not be alienated except with the approval of the Secretary of the Interior, and in no case to any person not a member of the Chippewa tribe. (16 Stat., 721.)

Numerous allotments of one hundred and sixty acres or less were made under this clause. (R., 128.)

The act of January 14, 1889, entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," (ch. 24, 25 Stat., 642), commonly called the "Nelson Act," provided for negotiations with all the bands or tribes of Chippewa Indians in Minnesota with a view to their relinquishing to the United States all their lands in the State, except so much of the

White Earth and Red Lake Reservations as might not be "required to make and fill the allotments required by this and existing acts" (section 1). It also provided for the taking of a census of the Indians by the commissioners, and enacted (section 3) that when the cession and census had been made all the Indians except those on the Red Lake Reservation should be placed upon the White Earth Reservation, and that—

> * * * thereupon there shall, as soon as practicable, under the direction of said commissioners, be allotted lands in severalty to the Red Lake Indians on Red Lake Reservation, and to all the other of said Indians on White Earth Reservation, in conformity with the act of February eighth, eighteen hundred and eighty-seven, entitled "An act for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes"; and all allotments heretofore made to any of said Indians on the White Earth Reservation are hereby ratified and confirmed with the like tenure and condition prescribed for all allotments under this act: *Provided, however,* That the amount heretofore allotted to any Indian on White Earth Reservation shall be deducted from the amount of allotment to which he or she is entitled under this act: *Provided further,* That any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this act on

> the reservation where he lives at the time of the removal herein provided for is effected, instead of being removed to and taking such allotment on White Earth Reservation.

The prior allotments referred to were those which had been made under Article VII of the treaty of 1867, above quoted.

The general allotment act of February 8, 1887 (24 Stat., ch. 119, p. 388), in conformity with which the allotments under the Nelson Act by its terms were to be made, provided in its first section:

> That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot [the lands in said reservation in severalty to any Indian located thereon in quantities as follows:
>
> To each head of a family, one-quarter of a section;
>
> To each single person over eighteen years of age, one-eighth of a section;
>
> To each orphan child under eighteen years of age, one-eighth of a section; and

> To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section.]

This was amended by the act of February 28, 1891 (26 Stat., ch. 383, p. 794), repeating the above language except the part inclosed in brackets, which it omitted entirely, inserting in lieu thereof:

> *To each Indian located thereon* one-eighth of a section of land,

thus abolishing quantitative distinctions entirely, and providing for uniform allotments of eighty acres each. This amendatory act also contained the proviso:

> That where existing agreements or laws provide for allotments in accordance with the provisions of said act of February eighth, eighteen hundred and eighty-seven, or in quantities substantially as therein provided, allotments may be made in quantity as specified in this act, with the consent of the Indians, expressed in such manner as the President, in his discretion, may require.

In their negotiations with the Indians at White Earth the commissioners appointed by the President under the Nelson Act promised them explicitly that if the contemplated cessions were made every man, woman and child on that reservation would receive an allotment of 160 acres. The Indians

made their cession upon the faith of that assurance. (House Doc. No. 247, 51st Cong., 1st sess., pp. 86, 91; 33 L. D., 298, 304.) The Interior Department, however, decided that this promise, based upon an erroneous conception of the statute and the treaty of 1867, was wholly unauthorized, and, as the amendatory act of 1891, *supra,* had by that time become effective, directed the commission to allot the Indians 80 acres each. (See correspondence and opinion of Assistant Attorney General, in Senate Ex. Doc. 99, 52d Cong., 1st sess.) The Indians insisting on the promise, refused the smaller allotments, and proceedings came to a halt, whereupon a bill was introduced in the Senate, May 20, 1892 (S. 3184, 23 Cong. Rec., 4456), similar to the Steenerson Act below mentioned, to enlarge the allotments to 160 acres. This bill, according to a report rendered to the Commissioner of Indian Affairs by the chairman of the commission Dec. 30, 1892, the material parts of which are set out in our appendix, "was made the basis of an arrangement between the commission and the principal chiefs and head men at White Earth, by which the Indians were to take an allotment of 80 acres, provided they be permitted to select an additional 80 acres to be held in reserve; and in the event of favorable action by Congress the 80 acres in reserve to each Indian was then to be made a part of his allotment."

Allotments at White Earth were then proceeded with under the Nelson Act, and as the departmen

adhered, and has always adhered to the view (accepted also by the plaintiffs in these cases) that the provisions of the act of 1891, *supra,* had taken in the Nelson Act the place originally occupied by the corresponding parts of the act of 1887, the allotments were, and have continued to be, made upon the basis of 80 acres to each Indian without regard to time of birth or family relations, " in conformity with " the act of 1891.

Many allotments were made under the Nelson Act, but, as this record plainly shows, the process had not been completed but was still going on sporadically at the times of the various transactions involved in these controversies. The act of June 10, 1896 (29 Stat., 325), had done away with two of the three commissioners, and by section 5 of the act of June 27, 1902 (32 Stat., ch. 1157, 400), amending the Nelson Act, it had been provided that " the Secretary of the Interior shall proceed as speedily as practicable to complete the allotments to the Indians."

Certain " pine lands " were retained as a part of the White Earth Reservation for the common benefit of the tribe. Prior to the Steenerson Act the department ruled that these were not allottable under the Nelson Act.

The Steenerson Act, approved April 28, 1904, is as follows:

> That the President of the United States be, and he is hereby, authorized to allot to each Chippewa Indian now legally residing

upon the White Earth Reservation under treaty or laws of the United States, in accordance with the express promise made to them by the commissioners appointed under the act of Congress entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January fourteenth, eighteen hundred and eighty-nine, and to those Indians who may remove to said reservation who are entitled to take an allotment under article seven of the treaty of April eighteenth, eighteen hundred and sixty-seven, between the United States and the Chippewa Indians of the Mississippi, one hundred and sixty acres of land; and said allotments shall be, and the patents issued therefor, in the manner and having the same effect as provided in the general allotment Act, "An Act to amend and further extend the benefits of the Act approved February eighth, eighteen hundred and eighty-seven, entitled 'An Act to provide for the allotment of land in severalty to Indians on the various reservations and extend the protection of the commissioners of the United States over the Indians, and for other purposes,'" approved February twenty-eighth, eighteen hundred and ninety-one: *Provided*, That where any allotment of less than one hundred and sixty acres has heretofore been made, the allottee shall be allowed to take an additional allotment, which, together with the land already allotted, shall not exceed one hundred and sixty acres: *And provided further*, That if

> there is not sufficient land in said White Earth (diminished) Reservation subject to allotment each Indian entitled to allotments under the provisions of this Act shall receive a pro rata allotment. (33 Stat., 1786, ch. 539.)

This legislation was not regarded by the department as superseding the allotment provisions of the Nelson Act. On the contrary, "original" allotments under the latter continued, and a systematic effort was made to induce all Indians on the reservation who had not procured them to do so before "additional" allotments under the later statute began. (R., 49, 127, 152.)

These suits were brought under the act of August 15, 1894 (28 Stat., 305), as amended by the act of February 6, 1901 (31 Stat., 760) (for the text of which see appendix), to determine the rights of the plaintiffs to two 80-acre parcels of land claimed by them as additional allotments under the Steenerson Act, the plaintiffs having already received their full quotas of land (80 acres each) under the Nelson Act. The bills are identical, except as to the parties plaintiff and the tracts claimed. The cases were tried together and resulted in decrees for the plaintiffs (see opinion of Circuit Court, R., 159), but upon appeals to the Circuit Court of Appeals the decrees were reversed, with instructions to dismiss the bills. (Opinion, R., 179; 171 Fed. Rep., 337.)

Upon the lands in controversy was a growth of pine timber. An estimate of the stumpage is to be found in the record (R., 41, 42), but nothing direct as to their value or the quality and accessibility of the timber on them.

The plaintiffs made their written applications to the agent in June, 1904, but were informed by him that applications under the Steenerson Act could not then be received. (R., 47.) The number of persons entitled and the acreage allowable to them *pro rata* had yet to be ascertained (46 *et seq.*). It was not until April 24, 1905, that applications under that act were entertained. (R., 47.)

On August 8, 1904, one Samuel E. Mooers applied to have the same lands allotted to his two minor children, Alice and Lewis, as original allotments under the Nelson Act. The lands were vacant; they were not segregated nor was their status deemed in anywise affected by the premature applications of the plaintiffs; and while, for the reason stated, they were not yet subject to allotment generally under the Steenerson Act, they were subject to be allotted to any qualified person under the Nelson Act, unless the fact of their being [redacted] timber lands was an obstacle. As neither of the Mooers children had received the bounty of the Nelson Act, each was entitled thereunder to an allotment of 80 acres upon application at any time and without waiting for the distributions under the Steenerson Act. The agent's clerk received the applications, marked the

lands on the agency plats as allotted to them, and made the usual entries on the allotment roll. So far as records of the agency were concerned, the process of allotment was thereupon, in form, complete, subject, of course, to the approval or disapproval of the Secretary of the Interior. The authority of the clerk to act at all was disputed, but this question is conclusively settled to the contrary by the rulings of the department. (R., 133, 134, 152, 154.)

The agent, however, directed the cancellation of these entries, and undertook to annul the selections *ex parte*. The reasons assigned are, mainly, that the lands, being "pine" lands, were not subject to allotment under the Nelson Act, and, incidentally, that certain lands which Mooers had fenced south of his own land were already reserved for his children. When allotments were at length made under the Steenerson Act, April 24, 1905, the lands in controversy were again selected by the plaintiffs and were allotted to them by the agent. Mooers appealed to the Indian Office. The Commissioner ruled in favor of his contentions and by letter of March 31, 1906 (R., 133), directed the agent to re-allot the lands to his children. The direction, however, remained in suspension, during an investigation by an inspector, apparently brought about at the request of the agent. The inspector's report, transmitted by the Secretary to the Commissioner without approval or disapproval by the former (R., 135), led the latter, under date of July 13, 1906,

to revoke his former order, sustain the plaintiffs, and direct the agent to allot other lands to Mooers' children. From this last decision Mooers appealed to the Secretary, who reversed it May 13, 1907, with instructions to re-allot the lands to the children (R., 152).

As will be seen from a reading of the Commissioner's letter of March 31, 1906, and the Secretary's final decision, the previous ruling against allotting pine lands was held to be abrogated by the Steenerson Act, because it was thought that the latter contemplated the allotment of the entire reservation.

Mooers received no notice of the agent's adverse action until November or late October, 1904. (R., 86.) He endeavored to obtain other "original" allotments for his children in May, 1905, but, according to his testimony and that of another witness, the lands which were then awarded them by the agent were not the tracts which he selected, and were worthless. (R., 88 et seq., 104 et seq.) There is no direct testimony to the contrary.

Other facts will be noticed incidentally in our argument.

ARGUMENT.

I.

Concerning jurisdiction.

1. That the value of the subject matter in each of these cases is sufficient to confer appellate jurisdiction on this court does not so far appear. We have in the record an estimate of the quantity of

timber on the allotments, but nothing as to its quality, its accessibility for lumbering operations, or its distance from railway or market, and nothing even as to the market price of lumber in the vicinity. There is no evidence either of the value of the land without the timber. Obviously the quality of the timber might be such as to make it very cheap. On the other hand, the quality might be excellent, and yet the difficulty of approach, due to swamps, streams, topography, or what not, might be such as to render these two small tracts practically worthless to lumbermen. It will not do to leave the vital subject of jurisdiction to mere guess or probability.

2. The learned Circuit Court of Appeals overruled the Government's objection to the original jurisdiction in these cases. There was no question but that under the original act of 1894 the rival claimant alone, the Government alone, or both together, might be made defendants. (*Hy-yu-tse-mil-kin* v. *Smith,* 194 U. S., 401; *Sloan* v. *United States,* 95 Fed., 193.) The objection was upon the ground that, as by the amendment of 1901 Congress intended that the Government only should be impleaded, controversies like these in which the rights of third parties are necessarily involved must necessarily be deemed excluded from the jurisdiction. The statute with its amendments, including one made December 21, 1911, appears in our appendix.

3. Assuming, however, that there was jurisdiction in the lower courts to entertain the suits, we

think it is entirely plain that there was not and is not jurisdiction to render decrees affecting the rights of the Mooers claimants without their presence in the litigation. This proposition was suggested by the court below (R., 181), and by the same court in a similar cause, in which the opinion was delivered by Mr. Justice Van Devanter. (*Oakes* v. *United States,* 172 Fed., 305.)

If decrees were rendered for the plaintiffs, by force of the statute they would "have the same effect, when properly certified to the Secretary of the Interior, as if such allotments had been allowed and approved by him." Obedience to this mandate would result in excluding the Mooers from their allotments; whereupon, by force of the same statute, they in their turn might bring suits against the Government, in which the same controversies would have to be reopened and determined anew. Decrees in their favor would not, of course, estop the present plaintiffs. The chaotic absurdity of such a situation points infallibly to the true solution—all parties interested must be joined in these cases to authorize any relief to the plaintiffs.

The Government, of course, can not be held to represent as guardian either pair of contestants. It might find occasion to reverse its former attitude by conceding the plaintiffs' claims or denying that any of the contestants is entitled; but the statute, if applicable at all, gives to each of them a right to be heard in court.

II.

The plaintiffs' claims were properly denied.

1. *The Secretary's decision.*—It may be profitable to invite attention to the inconsistent attitudes assumed by the plaintiffs in these cases. Their bills were framed upon the theory that the allotments had been wrongfully refused by the Government through the final decision of the Secretary of the Interior in June, 1907. (R., 5, 20.) After the Government had answered, setting up and justifying this decision in favor of the Mooers (R., 8, 23), the plaintiffs having obtained stipulations extending their time therefor (R., 15, 26) filed their general replications (R., 11, 26). Later, without the authority of any stipulation or order of court, they undertook to inject into the record pleadings called "replies" (R., 12, 27), in which, among other things, they alleged that the decision was rendered without notice of the appeal, and contended that the action of the Indian Commissioner in their favor therefore remained in full force, still insisting, however, that the Government was wrongfully refusing to allot them the land. Some months later, by stipulations (R., 18, 33), they added to their bills by interlineation averments to the effect that the lands *were* allotted to them April 24, 1905, and that thereafter they had been "unlawfully denied and excluded from said allotment and land" without saying how or by whom.

If it were true that the Secretary's final action must be brushed aside as a nullity and that the

Commissioner's action which it purported to reverse must be treated as allotting the lands to the plaintiffs, there would be no justification whatever for these suits; for, being equipped with full ownership, the plaintiffs would be able to protect it against all individuals who interfered with its enjoyment, and there would be no permission or occasion to sue the Government concerning the title. The allegation that the plaintiffs were "excluded" surely does not suffice to involve the United States.

We believe that the plaintiffs are in no position to question the validity of the Secretary's decision. The issue should have been tendered specifically in the bills. The special replications, filed without permission of the court, and in defiance of the equity rules (Rule 45), are improperly in the record. Furthermore, the proofs are insufficient to overcome the presumption of due notice, consisting, as they do, merely in denials by Warren and the elder Fairbanks, and by an attorney who testified that he appeared "before the department for Warren and Fairbanks in these cases." (R., 61.) The relation which this attorney bore to the departmental proceedings, when the appeal was taken, was not shown. The record was not produced. *Non constat* but that other attorneys appeared and were duly notified. It is to be observed also that although the parties and the attorney obtained knowledge of the decision very soon after it was promulgated (R., 62, 78, 80), they made no effort to secure a rehearing.

Of course, in a proceeding of this character the chief importance of the decision lies in the presumption to which it gives rise. The burden is heavy upon the plaintiffs to show that it was wrong, not only because the departmental action, though reviewable, is in itself entitled to serious respect, but also because to reverse it in these instances might involve the overthrow of other titles in like case. These considerations should operate to resolve every doubt against the plaintiffs, and they should not be permitted to recover unless their claims shall be found to be clearly right.

2. *Capacity of the Mooers' children to take under the Nelson Act.*—If we understand the plaintiffs' contention here, it is limited to this: That as the amendatory act of 1891 must be read into the Nelson Act, to measure the allotments and determine the persons entitled, and as the act of 1891 provides that an allotment shall be made to each Indian "located" on a reservation subjected to allotment, these Mooers' children could not take, because they were not living and hence not so "located" *when the act of 1891 was passed!* This position rests entirely upon a construction of the act of 1891—part of the general allotment act, which more than any other statute declares the policy of Congress in regard to allotments and the individualization of tribal Indians. The court will instantly perceive that it is a narrow and illiberal construction, which nothing in the statute itself or in the policy behind it could possibly excuse. The

act applies to "all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation" and authorizes the President "to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot to each Indian located thereon one-eighth of a section of land," and to do this "whenever in his opinion any reservation, or any part thereof, * * * is advantageous for agricultural and grazing purposes." What was said by the court below concerning the amended act of 1887 applies equally well to this amendment, the relevancy of which seems not to have been brought to its attention in these cases (R., 181):

> The statute vests a continuing power, and he (the President) could provide from time to time for allotments in favor of those born upon the reservation subsequent to the first order dealing with the subject so long as there were lands of the reservation which had not been allotted. The statute submits the whole subject of the distribution of the lands embraced in the reservation to the President, acting through the Interior Department.

Such a statute, passed wholly in the interest of the Indians, should, in case of any doubt, be construed with the utmost liberality in their favor. A construction which would work discrimination against the newborn and deny them allotments while surplus lands still remain within the reserva-

tion should be avoided, if possible, for surplus lands are the lands of the tribe, and—

> The policy of the Government has always been to secure to each individual of an Indian tribe an equal share in the lands of his tribe, and that policy should be adhered to by the executive branch of the Government unless some provision of law clearly and expressly prevents that course. (Opin. Asst. Atty. Genl., 35 L. D., 221.)

Pursuing the inquiry somewhat more carefully and beyond the limits of the opposing brief, questions will naturally occur to the court as to whether the Nelson Act, strictly considered, did not really intend that all of the White Earth Reservation should be ceded save only so much land as would suffice for allotments, in the graded quantities specified in the act of 1887, to the Indians found living at the time when the census was made, or when the cessions were approved, or when the removals to the reservation were accomplished; and whether the amendment of 1891 should not have been deemed wholly inapplicable. The practical answers to these questions are to be found in what followed. The Commissioners, in negotiating the cession, explained the Nelson Act as giving 160 acres "to every man, woman, and child" (House Ex. Doc. 247, *supra;* Opinion of Asst. Atty. Gen'l, 33 L. D., 298), and reserved a quantity of land then considered ample to fulfill the promise; and the department, though repudiating

that construction, applied the act of 1891, so that all the allotments under the Nelson Act were of 80 acres each, and minors were recognized without regard to the original census or time of birth. In this there was general acquiescence and participation by the Indians of the reservation. The correctness of this practical construction was recognized by the Steenerson Act, which assumes the legality of the allotments already made and construes the promise of the Commissioners as one under which allotments of 160 acres should be allowed "to each Chippewa Indian *now* legally residing on the White Earth Reservation," deducting, of course, any lands already taken. And before that, when Congress, by the act of June 27, 1902, *supra*, directed the Secretary "to proceed as speedily as practicable to complete the allotments to the Indians," it must have known and approved of the theory upon which the process had theretofore been conducted. But it is not necessary to rely upon this legislative approval. The application of the act of 1891, as to quantity at least, was authorized by the proviso which we have quoted from that act, if the consent of the Indians were obtained. That consent, as we have shown, was given in effect. (The Circuit Court, in the absence of any showing, should have presumed as much.) And in the light of the principle and policy above mentioned in connection with the general allotment act, there was no just ground

for saying that the Nelson Act was violated by permitting the Indians of tender age to share in the tribal property as long as there was any to divide. They, no less than their elders, were interested in the unallotted lands of the reservation as they were also in the proceeds of those which had been ceded. And if, as must be here assumed, the surplus was enough to serve all with 80-acre allotments, why should any be refused?

It is important also to consider that a denial of the general and continued operation of the Nelson Act in the matter of allotments might operate to frustrate in part the objects of the Steenerson Act. Recognizing that under the treaty each member of the contracting bands was guaranteed the right to obtain 160 acres upon certain conditions and that the Indians in negotiating under the Nelson Act had relied upon the promise of the commissioners that each would receive that quantity, the dominant purpose of the Steenerson Act is to fulfill the reiterated obligation. Recognizing also that in the spirit of this obligation, as well as in the view and practice of the department, all living Indians who had not received them were entitled to allotments, the act includes all as beneficiaries. In its endeavor to insure equality it excludes altogether the Indians who had already been allotted 160 acres under the treaty, limits those who had obtained less quantities under the treaty or Nelson Act, and concedes full quantities to those who had received nothing, so that in the end all shall enjoy in equal measure so

far as the lands of the reservation "subject to allotment" will go. Now the last proviso is:

> That if there is not sufficient land in said White Earth (diminished) Reservation subject to allotment each Indian entitled to allotments under the provisions of this act shall receive a *pro rata* allotment.

And if Indians who had received no allotments were rigidly obliged to pro rate with Indians who had received 80 acres each, gross discriminations would result in case of a deficiency of allotable land. For instance, if but 120 acres were available for two Indians, the one who had received 80 acres would receive 40 more, making his total 120 acres, while the other would have but 80 acres all told. Such a result would defeat the professed purpose of the act; but it is easily avoided by confining the proviso to supplementary allotments and conceding the continued application of the Nelson Act to all Indians who had not received its benefits. The word "heretofore" in the first proviso of the Steenerson Act should be related to the time when allotments thereunder should occur, rather than to the time when the act itself becomes a law. (*Whipple* v. *Judge*, 26 Mich., 342; *Gilkey* v. *Cook*, 60 Wis., 133, 137; *Perrine* v. *Farr*, 2 Zah., 356, 365.) That the Steenerson Act requires careful coordination with its antecedents is the more apparent from the fact that, taken literally, it would permit an additional allotment of 160 acres to one who had already obtained the same quantity under the treaty of 1867.

3. *Rights of the Mooers children under the Steenerson Act.*—Even if we were obliged to concede that the Mooers children never had rights to allotments under the Nelson Act, or that the allotment provisions of that act were impliedly repealed and superseded by the Steenerson Act, the concession would not avail the plaintiffs. The Steenerson Act does not prescribe the order or mode in which selections shall be received and acted upon; it leaves that to the wisdom and discretion of the Executive. In exercising this discretion it was the duty of the Executive to heed and effectuate the evident purpose of Congress to insure equality of benefit among all the Indians of the reservation. Manifestly it was but fair that those who as yet had received no allotments should in the first instance be placed as far as possible upon a par with those who had, and in view of the scheme for the general and final distribution which had been adopted, this could only be accomplished by allowing the former to select their 80 acres each before that distribution began; otherwise the weak, the ignorant, and the absent would be doubly unfortunate in the outcome. Thus the action of the department in notifying all who had not received them to come in and select their "original" allotments was amply justified whether the right to select them was given by the one statute or the other.

An accurate conception of the rights of the several claimants is to be achieved only by considering in *pari materia* all of the legislative provisions we

Q. Will you go on and tell, by referring to the plat, how much of that land has been fenced.

128 A. Has been fenced all together?

Q. Yes.

A. Well, three-quarters and three-quarters is a mile and half and—

Q. State where that fence runs; commence at some point.

A. Well, beginning at the 16th corner on the north half of the west line of 18, the fence runs three-quarters of a mile east; that would be the length of three lots or three forties. Then it runs south half a mile; that would be the length of two forties of lots 7 and 10. Then it runs west three-quarters of a mile to the 16th corner on the south half of the west line of 18. Then it runs north half a mile to the beginning, but recently the fence clear around lot 2 has been torn down. The wires are there but the posts are taken away.

Q. What do those two parallel lines represent?

A. This represents a lane running from the 16th corner, a distance of fourteen chains.

Q. From whose place?

A. From lot 8. It runs into lot 8.

Q. Then goes where from that point?

A. Then twenty chains and seventy links west and fourteen chains and fifty links north to a lot.

Q. Where is Samuel E. Mooers' residence?

A. It is on the southwest 10 acres, I would say, of lot 4 in section 7.

Q. So that this fence, then, or alley runs down from his place directly south to the northwest corner of the southwest half of section 18, and then directly east until it enters into lot 8? A. Yes.

Q. So that cattle could run from his barn-yard in lot 4, section 7, down to and into lot 8? A. Yes sir.

Q. What kind of a fence is that that you have described?

A. Well, it is a wire fence; part of the fence is three wires and part of it two, and the posts were most all oak-split posts, a few tamarack, and I did notice three or four popple posts around. The fence is in good repair.

129 Q. That plat was prepared by you?

A. Yes sir, I prepared this plat.

Q. Is it correct? A. It is correct.

Mr. Edgerton: I offer it in evidence.

Objected to by defendant as incompetent, irrelevant and immaterial. It relates to land other than that involved in this suit.

Plaintiff rests.

Samuel E. Mooers, sworn as a witness on behalf of defendant, testified as follows:

Examined by Mr. Haupt:

Q. You are a mixed-blood Chippewa Indian and a member of the tribe and enrolled as such? A. Yes sir.

Q. And drawing an annuity? A. Yes sir.

Q. And reside on the White Earth reservation?

A. Yes sir.

Q. You are the Samuel E. Mooers who is named as the father of the two minor children Lewis and Alice Mooers?

A. Yes sir.

Q. And the same Samuel E. Mooers who on August 8, 1904, made application to have the lands involved in this controversy allotted to your two minor children?

A. Yes sir.

Q. You made that application. Did you hear the testimony of the witness Perrault who has testified here to-day?

A. Yes sir.

Q. What was said between you and Mr. Perrault that day?

A. Why, he wanted to know, when I went in, what I wanted. I told him I wanted to make those allotments now, and I gave him a little plat, threw it down, and he looked at it, and he pulls a little book out of his pocket and run down two or three pages of it, and says, "That is all right, Mooers, you can have any of that."

Q. What kind of a little book was this that he looked at?

A. It was a little, narrow book that fits the top vest pocket.

Q. What was the color of it?

130 A. It was kind of a reddish book.

Q. Did you see what the contents of the book were?

A. Yes sir, he just had a list of names entered there for certain pieces. I didn't take no particular notice of the names there, but that is what he kept that thing for, and it was this piece; there was no applications for it, and he told me right there that there was no applications for this piece.

Q. And so he made the allotments to you?

A. Yes, he made the allotments.

Q. Those allotments were afterwards canceled by directions of the Department of the Interior. When did you first hear of such cancellation?

A. Through the office here.

Q. From any source?

A. Yes. Well, sir, that was either the last of October or first of November.

Q. Of the same year? A. Of the same year.

Q. How did you hear of it then?

A. I don't know whether the first notice was a letter or whether my wife got it over here; I wouldn't say which was the first, but I most think it was through a letter.

Q. And that was in October or November?

A. Yes sir, I think that was along the forepart of November, either the last of October or the first of November.

Q. Of 1905?

A. Yes,—No, that would be in 1904.

Q. Yes, 1904. What did you do, if anything, after hearing that these allotments were canceled?

A. I didn't do anything; I just let it lay just that way; I didn't make any attempt to make any other selections.

Q. Did you ever do anything to protect those allotments?

A. Not until I came over here when the agent jumped on to me about them.

Q. When was that?

A. That was in December, the same fall.

Q. What was done then or said?

A. Well, he told me that I would have to make other selections. That was on the 12th, I think, when I was here.

Q. 12th of December, 1904?

A. Yes sir. And we had quite a talk about it. It was a little warm once in awhile.

131 Q. Give the conversation as nearly as you can recall it.

A. Well, the way it started, he says, "You can't have those pine claims." He says, "You have got to make other selections." He says, "I hear you have been cropping in your pasture." I says, "I have never cropped any of that pasture; I never broke a furrow." He says, "That is different." He says, "I have been told that you have been farming on it." I says, "All the grain that was ever sowed there is grain that went through my stock." He says, "You look for something else." I says, "I can't do it. The last horse will play out before I get home." He did, too. So I didn't go and look for anything. It run along that way—

Q. Did you ever do anything concerning those allotments of August 8th?

A. To change them for others, get others in place of them?

Q. Did you get those?

A. Not until after the 24th.

Q. Go on and tell what you did.

A. Well, this time kept running on just the same. Of course the agent wanted me to go and make other selections, and then we made those selections in April 24, 1904.

Q. What selections did you get then?

A. I didn't make any that day because other parties was ahead of me. That day, of course, my number didn't come in so that I could take anything, but we got little slips half an inch wide and three or four inches long with figures on, to come in on the next morning, in order to hold our places. But in the evening of the 24th I met the agent over there to LaChapple's store and Mr. Fairbanks and Warren was in that place, and a number of them was in there. Of course I was sitting there, and the agent comes along and pulls my sleeve and says, "I would like to talk to you", and so he kept leading on and leading on, until he got to the government warehouse, and he stepped off the walk. "Now, Mooers," he says, "in regard to those pine claims, you give them up, and I will give you something that is just as good or nearly as good", "Well," I says,

"By God, it looks funny, you claim I am not entitled to
132 them at all and here you call me out down in the hollow and ask me to give up something that you claim I haven't got." I says, "I can't do it. If they have the strength of a rye straw, I am going to hold them until it breaks." He says, "You will never win out before the Department." I says, "I don't know." I says, "I am going to hold them." He says, "I don't give a damn, you can do as you please, you will never [wint] out before the Department." I says, "You are not the Department, not by a hell of a ways, not yet." So we stopped right there, there was no more said about it.

Q. Did you ever do anything to win out in the Department?

A. Win out?

Q. Yes.

A. We took out—It ran along—they made allotments,—I don't know exactly—it was on the 25th. Of course I took one eighty but not for one of those children, it was for Charles Eugene, and then he reserved one for Elsie. Of course that run along until they commenced in May again. I did attempt to change those allotments at that time.

Q. In May?

A. Yes. I kind of felt as though it was going to cause a lot of trouble and that I might not be able to get anything, so I put in an application for those two children for hardwood, and here it was way out here by 142-39 right in the worthless stuff. I wouldn't give a dollar an acre for it to-day. I know what it is, I traveled right on it.

Q. Those were applications of May 15th?

A. Those applications were made May 15th.

Q. They were made under the Act of May, 1889, and 1904?

A. Yes; their additional was to be section 28-145-42 right near Mahnomen, but they are changed; one goes in as additional and the other as original.

Q. Then you want to state that you didn't get the lands, in your May applications for allotment, that you designated?

A. No sir, I never got them at all, didn't get within
133 nine miles of it.

Q. So you didn't accept those allotments?

A. No sir, I do not. So I started right from there with this contest.

Q. Who represented you in the question of your contest? Was it Fred J. Beaulieu?

A. Yes sir. He did quite a bit of corresponding for me.

Q. He took it up at your request, did he? A. Yes.

Q. I will show you a letter here addressed to Francis E. Leupp, Commissioner of Indian affairs, under date of January 22, 1906, and signed by Fred J. Beaulieu. Do you remember that letter?

A. I expect I have a copy of those things to look over. I haven't looked over them for a long time.

Q. Was that written to the Commissioner? A. Yes sir.

Q. On your behalf and at your request by Fred J. Beaulieu?

A. Yes sir, that is right.

Q. You also had an investigation here in June, 1906, did you not? A. No sir, we had kind of a one.

Q. Well, there was an investigation here?

A. Yes, kind of a one.

Q. In June, 1906. And so you prosecuted your attempts to recover this land and finally prevailed? A. Yes sir.

Q. And the land, some time in 1907, was re-awarded to your children? A. Yes sir.

Q. Alice and Lewis. There has been some talk here, Mr. Mooers, about some land on section 18, and some testimony has been given showing that this land was marked reserved for the Mooers on the plat. If that entry or memorandum appears on the plat in that form, was it ever put there at your instigation or request? A. No sir, it never was.

Q. Did you ever claim that land in section 18?

A. No sir.

Q. As being reserved for allotment purposes for any members of your family?

A. No sir, it is too poor stuff.

134 Q. Were you induced to apply for other allotments by reason of the agent's telling you that you never would be able to get your allotments on section 15? A. Yes sir.

Q. Of August 8th, on section 15?

A. Certainly, that would induce me all right.

Q. Well, did it?

A. Well, it did, certainly. I felt as though maybe I was in the wrong and wouldn't get anything, but after I saw I couldn't

get what I wanted the second selection, I thought my first one was just as good as a second one.

Q. You thought your first one just as good as your second?

A. Yes.

Q. That is in law or equality? A. Well, both, I thought.

Q. That is your second selection; by that do you mean the selection you intended to get? A. The second.

Q. But which you didn't get? A. Sure.

Q. As I understand your testimony, the lands that were assigned to you in your applications of May 15th, 1905, are not the lands which you located?

A. No sir, I never was over this tract of land.

Q. Did you write out and hand to the agent the land that you intended to select on May 15, 1905?

A. No sir, but I took Mr. Beaulieu right side of me. I wouldn't approach the office without a man with me.

Q. Just answer my question. How did you designate to the agent? A. We selected right from the plat.

Q. Did you write it out?

A. No sir. I got no writing, memorandum or anything.

Q. Did you read it off from the plat?

A. Yes sir, Mr. Beaulieu was right there. He was right by the plat and talked it over just the way we wanted it.

135 Q. Did anybody make a memorandum of it?

A. To carry it off? You mean to keep it?

Q. No. Was it written down in any form by anybody?

A. The agent took it.

Q. What agent took it?

A. I don't know I am sure. There was a crowd stepped by as fast as they could.

Q. Who was the agent you were talking to?

A. Simon Michelet.

Q. That was on May 15th? A. That was on May 15th.

Q. When did you first learn of the lands that were assigned to you as allotments? When did you first learn of the lands that now appear to have been assigned to you as allotments on May 15th? A. Of these last ones on 15?

Q. No, on May 15th. When did you first learn the description of the [of the] lands that had been assigned to you?

A. That was along, I think in May 14th, if I am not mistaken, somewheres close right there.

Recess.

Evening Session.

Q. Mr. Mooers, you stated that about May 15, 1905, you designated certain lands to the agent that you desired to have allotted to your two children Lewis and Alice? A. Yes sir.

Q. That is correct, is it? A. Yes sir, that is correct.

Q. Did you make your designations from the plat?

A. Yes sir.

Q. Those were designations for both original and additional allotments? A. Yes sir.

Q. Now, there has been introduced here an application for an allotment, identified as Plffs. Ex. 20. This application is dated May 15, 1905, for an allotment under the act of January 14, 1889, to Alice Mooers of the northwest quarter of the southeast quarter and the southwest quarter of the southeast quarter of section 28, town 145, range 42, containing eighty acres. That is some that were selected?

A. It wasn't for the original.

136 Q. That was not for the original?

A. That wasn't for the original, no sir.

Q. You selected that— A. For the additional.

Q. Then Plffs. Ex. 22, dated May 15, 1905, purports to be an application for an allotment under the Act of January 14, 1889, to Lewis Mooers of the northeast quarter of the southeast quarter and the southeast quarter of the southeast quarter of section 2, town 142, range 39. Is that a portion of the land you designated for an allotment for your children?

A. No sir, I never saw this tract of land.

Q. Is that some that you designated?

A. No sir, it is not.

Q. Plffs. Ex. 24, dated May 16, 1905, purports to be an application for an allotment under the Act of April 28, 1904, for your son Lewis Mooers of lot 1, and the southeast quarter of the northeast quarter of section 2, town 142, range 39. Is that a portion of the land you designated? A. No sir, it is not.

Q. Did you designate that at all for any purpose?

A. No sir.

Q. Plffs. Ex. 26, dated May 17, 1905, purports to be an application under the Act of April 28, 1904, for an additional allotment to Alice Mooers of the northeast quarter of the southeast quarter and the southeast quarter of the southeast quarter of section 28, town 145, range 42; did you designate those lands?

A. Yes sir, each one of those children has got an additional eighty.

Q. Did you designate the lands I have just read as a part of the lands that you wanted allotted to your child Alice?

A. Yes sir.

Q. Was that for an allotment under the Steenerson Act?

A. Yes sir.

Q. That allotment is correct, then, is it, according to your understanding? A. Yes sir.

Q. And according to your understanding is that the only one that I have read that is correct?

A. Of the four, yes sir.

137 Q. Are you able to state what lands you designated to the agent to be selected for your children other than the lands described in Ex. 26 and for what purposes and under which acts you designated them, for allotment purposes.

A. The last selection that I made?

Q. I am just talking about this selection, about May 15th now. Are you able to state what lands you did designate at that time? A. Yes sir.

Q. You may state them.

A. Alice was to have the east half of the southeast of 28-145-42.

Q. Under what Act? A. That is the additional.

Q. That is the additional?

A. Yes sir. And Lewis the west half of the southeast of the same town and range.

Q. What was that to be for? A. That was the additional.

Q. You have stated that this additional to Alice was correct; that is right? A. That is all right for her.

Q. That is the northeast of the southeast and the southeast of the southeast of 28? A. Of 28-145-42.

Q. That was correct? A. Yes.

Q. What lands did you designate for the original allotment under the Act of 1889?

A. It was the east half of the northeast quarter of section 2-144-40.

Q. That was for whom? A. That was for Lewis.

Q. And what did you have for Alice under the Act of 1889 as original allotment?

A. The east half of the southeast of section 2-144-40.

Q. Was anyone present with you at the time you made these designations? A. Yes sir.

Q. Who was present?

A. Mr. Beaulieu stood right side of me. He was the man who selected this oak land for me.

Q. What is his Christian name?

A. Theodore B. Beaulieu.

Q. Now, I will ask you when you first learned of the lands that were allotted to you as described in Plffs. Exs. 20,

138 22 and 24. That is, in 20 the land is the northwest of the southeast and the southwest of the southeast of 28 as an original allotment to Alice.

A. That was along in the latter part of November, 1905.

Q. And at that time did you learn of all the allotments made in these four exhibits? A. Yes sir, I did.

Q. Did you have any talk with the agent at that time?

A. No sir.

Q. Did you ever talk with him about these allotments not being correct, according to your understanding of them?

A. I don't know as I ever did. When I see that I couldn't get those, why I went right in for the first ones.

Q. Well, did you ever tell the agent that he had not allotted the lands you had designated?

A. I don't know as I ever did.

Q. What was the character of the lands that you designated for allotments to your children? A. For the originals on 2?

Q. Well, for the original allotments.

A. That is hardwood and it is fine soil in there. Mr. Beaulieu made the selection.

Q. Did you ever see that land yourself?

A. Yes sir, I seen it since.

Q. Did you see it before you applied to have the land allotted?

A. Yes sir, I drove in on it. The road runs right across the end of it.

Q. And what is the character of the lands that was allotted to you under these exhibits as original allotments?

A. That is one over there (indicating) and the other is 145-42.

Q. Well, Ex. 20, original allotment, is in section 28.

A. Those should have been additionals. That is the way they were taken.

Q. What was the character of that land, I asked you.

A. Well, it is prairie, kind of a brush prairie.

Q. And the original allotment to Lewis is in section 2. What is the character of that land?

A. I never was over that that piece, but I have been along Mr. Fairbanks' logging road. It comes close to his logging road. It is practically worthless, that whole country along there.

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Q. What is the character of it as to being timber land or open land?

A. It is open land, it is brush and stone, swampy; some small [tammarack]. There may be some scattering pine trees now and then but a very few.

Q. And you say that none of these lands that I have read from Exs. 20 and 22 were designated by you as original allotments to your children? A. That is on 28 and 2?

Q. 28 and 2.

A. No sir; there is only one additional that is filed right there to Alice. Lewis has had an additional 28, and each of them an original in section 2-144-40.

Q. The one that you say is right is Ex. 26 to Alice Mooers as an additional? A. Yes sir.

Q. And the other three you repudiate as not having been allotted to you, according to your designation? A. Sure.

Cross Examination

By Mr. Edgerton:

Q. Mr. Mooers, you testified in June before inspector Churchill, didn't you? A. Yes sir.

Q. At this office. Didn't you state in that examination that your children Alice J. and Lewis D. had received no allotments? A. No allotments?

Q. Yes; didn't you so swear before—

A. No allotments, either additional or original?

Q. No allotments.

A. I don't know as I did because they had their originals, you know, for they had been placed right on 28—

Q. Did you or did you not testify as follows: "I have five children and three of them have received allotments of 160 acres each." You testified to that, did you?

A. Three of them?

Q. Three of your five children, that they had received allotments of 160 acres each?

A. Sure, there was four of them at that time,—Eu-
140 gene, Elsie, Daniel and Everet.

Q. Did you or did you not testify as I have read?

A. That there was only three?

Q. No, that "I have five children?" A. Yes sir, I did.

Q. You had five children then?

A. Yes sir, I had five children.

Q. And didn't you say three of them have received allotments of 160 each?

A. I don't know for sure now, you know. There should have been four of them there. I will tell you, I lost one boy.

Q. You say "I have five children."

A. Yes sir, that is right.

Q. And this is correct, is it? A. That is right, yes.

Q. And three of them have received allotments of 160 acres each? A. Yes.

Q. "My wife is not a member of the tribe."

A. That is right.

Q. My daughter, Alice J., aged eight years, and my son Lewis D., aged six years, have received no allotments." Didn't you testify to that?

A. No, I don't think I did, not to any allotments. Their additionals were on them.

Q. You don't think you testified to that?

A. No, I don't. I am certain their additionals was on. I don't see why that should come.

Q. You had lost one child before?

A. Yes sir. He had had his 160 acres. I broke and got the benefit of the improving.

Q. Didn't you also testify as follows: "No timber land has been allotted to me or to either of the four children up to the present time?" A. The four children?

Q. Yes, didn't you testify that way, "No timber land has been allotted to me or to either of the four children up to the present time"?

A. Why, no. They had two additionals, eighty of timber then. There was four children, counting the one I lost and myself, that wouldn't have anything. When you count the living ones, surely one of them had—

141 Q. Now, you deny that you testified to that before Mr. Churchill, do you, "No timber land has been allotted to me or to either of the four children up to the present time?"

Objected to by defendant for the reason that it is asking an impeaching question and being immaterial to the issue now involved and for that reason is incompetent as an impeaching question.

Mr. Haupt: By the four children you do not include Alice or Lewis?

Mr. Edgerton: No. I will give him the most favorable construction of that. There is nothing of that kind in the testimony, the testimony is just this: "No timber land has been allotted to me or to either of the four children up to the present time."

Q. Now, do you say that you didn't testify before inspector Churchill as stated there?

A. You should bring that in in a way to bring in the four children and myself without timber, by taking Alice and Lewis in there and Daniel and Everet. There was no timber for them. The agent had canceled the originals and there was nothing up to that time.

Q. Then did you testify before inspector Churchill—

A. I guess that is right.

Q. "No timber land has been allotted to me or to either of the four children up to the present time?

A. I guess that is right if you take in the four that way.

Q. When was any timber land allotted to you or any of your children?

Objected to as not proper cross-examination. It relates to nothing concerning which the witness was interrogated in his examination in chief, and is incompetent, irrelevant and immaterial.

A. On the 25th day of April, 1905.
Q. And not until that time? A. Not until that time.
Q. Where were you living in 1904?
A. I lived out here on the prairie on my farm.
142 Q. All summer of 1904? A. Yes sir.
Q. Now, examine Ex. 27. Is your home represented there on that plat?
A. This would be on 4. My house sets right about here (indicating.)
Q. Indicating the figures 8.24 on the plat?
A. About five rod of the wagon road here, main road.
Q. Is this the main road here?
A. Yes sir, this is the main road right up and down there.
Q. Whose land is this here?
A. This is mine in here right to the edge of the creek here.

Mr. Haupt: The cross-examination of the witness concerning Ex. 27, being the Morton plat, is objected to on the ground that the witness was not interrogated in chief concerning the same and for the reason that the subject matter of the plat relates to lands not involved in this controversy, and the testimony is incompetent, irrelevant and immaterial.

Q. Now, you notice the line indicated or marked Creek?
A. Yes sir.
Q. On the lot that has the words "Fenced lot" south of where your house is?
A. Yes sir; that cuts the line back here and comes off here.
Q. You owned that lot did you, that that creek runs through? A. Yes sir.
Q. And did you have an alleyway fenced from that lot that the creek is upon, running south along the east side of the section to the northwest corner of the south half of the section?
A. On the east side?
Q. Yes running south.
A. No sir, I had a fence on the west side running down.
Q. Yes, the west side; that it right. A. Yes sir.
Q. Did that alleyway run down along the easterly fence on both sides on the north of lot 2?
A. That would be lot 2, would it? Yes sir, the lane comes on the Morrison land. Here is lot 2, all fully outside of my land.
143 Q. Did that alley run to lot 8?
A. Yes sir, it ran to lot 8.
Q. So that cattle could run from the lot that the creek is upon, down to the northwest corner of the south half of section 18, thence easterly and go upon lot 8? A. Yes sir.

Q. Now, did you have a fence around and enclosing lots 8, 7, 3, 9 and 10 of the south half of section 18 town 141 range 42?

A. Yes sir, there is a fence right around that.

Q. Did you have a strip of plowed land extending through the middle of the south half of said section 18 clear across the section?

A. Yes sir, you would find a strip of plowed land right here about where I had my first fence. It is right in the lane right here.

Q. Just answer my questions now. How wide was that piece of plowed land?

A. Oh, some fifteen or twenty feet wide where the fence was. The fence is built right on the center of it.

Q. Lots 3, 9, 10, 7 and 8 were enclosed as one piece, wasn't it? A. Yes sir, all taken in.

Q. What kind of a fence was that?

A. It was a two wire fence.

Q. Wasn't it three wires in some places?

A. Yes sir, along here where that field was; it was three wires alongside of this.

Q. On the north side of the half section it was three wires?

A. Yes sir.

Q. What kind of posts were they?

A. Part [tammarack], part popple and part oak.

Q. When did you build that fence?

A. Well, sir I built it at all times. I built some of it about twelve years ago. That was built somewhere about ten or twelve years ago, then I moved down to here. I had a fire break along here and another fire-break here and we had our fence here. And then we come on down here and along here (indicating), the third time.

Q. When did you do that third time?

A. The third time, about seven or eight years ago this
144 spring.

Q. When did you do it the second time?

A. The second time was about a year or two before that.

Q. When did you do it the first time?

A. The first time, it is about eleven or twelve years ago, when I drove in that small post there. I didn't have only about seven or eight head to turn out then.

Q. When did you commence pasturing land on the south half of that section?

A. The first summer or two I didn't have any fence, I just turned my cattle over there and saw that they didn't get away too far.

Q. You turned your cattle—

A. I turned them across the creek and there was no fence around the place no place.

Q. When did you first turn cattle into the enclosure that you have stated here, on the south half of the section?

A. Oh, they have been in there nine or ten years; ten years anyway.

Q. And didn't you keep cattle for other people in there?

A. Yes sir.

Q. And horses? A. Yes sir.

Q. And you have done that every year, haven't you?

A. Not every year. There was only a season or two, three or four, that we could get anything of that kind.

Q. What three or four years were those?

A. I have been off two summers, you might say three or four years, when I got my last fence there. I got in about four or five years that I got a little stock.

Q. That was after you put the last fence around, was it?

A. Yes sir.

Q. How many seasons did you pasture there after you put the last fence around?

A. Well, I have been away two years. I used it probably four seasons.

Q. What four seasons were those? A. That was 1891—

Q. And what other years? A. 1892, 1893 and 1894.

145 Q. For whom did you have cattle and horses there?

A. I could name a few of them.

Q. Well, name them?

A. Well, Henry Jausand, he pastured the last season there three head; that was two years ago this spring. And these gentlemen you have over here, I think they pastured there one or two seasons about ten or eleven head each.

Q. And who else?

A. The Milecke boys have had some in there one year.

Q. How many did they have?

A. About seventeen or eighteen head.

Q. And who else had any?

A. Jens Lorenson had some there, some ten or twelve.

Mr. Haupt: I object to any further cross-examination. It doesn't relate to anything the witness was interrogated about in his examination in chief and not relevant to any issue in this case.

Q. How many did he have?

A. I think he had about twelve head there one summer.

Q. What summer was that?

A. I don't know; that is about four or five years ago.

Q. And who else?

A. I would like to give them all to you if I could think of them.

Mr. Haupt: Name the whole reservation.

Q. How many different parties were there in all, about how many? A. Oh, I should say about six or seven all together.

Q. Where did these people live that put—

A. Just over the lane, up and down; some of them about six miles away.

Q. Outside of the reservation?

A. Yes, outside of the reservation.

Q. How many of them, during those years 1891, 1892, 1894 and 1895 were pastured in that enclosure on the south of that section 18?

A. I think 100 head would cover the whole thing, from one season to the other.

146 Q. 100 head a season?

A. No, I mean for the whole thing. We will say ten or fifteen head for five years—twenty head for five years.

Q. Twenty head from other people? A. Yes sir.

Q. You kept your own cattle in there?

A. Yes, I kept my own cattle in there.

Q. How many head did you have in there?

A. Oh, I had anywheres from thirty to eighty-five.

Q. When you say you had that many head, do you mean horses and cattle too?

A. No, just my cattle. I used to keep that many right straight along but I herded my cattle a good deal.

Q. What did you charge a season?

A. I charged them a dollar a season.

Q. You continued to occupy that land in that way until after April, 1905, did you not?

A. Yes sir, I left it for my renter even at that time, too.

Q. And since, you have left it to your renter?

A. Sure. We used it for pasture just the same as we ever did. Those fellows that rented that forty there went to work and tore down that fence, which they had no business to do.

Q. Which forty?

A. Around the first lot there next to the lane. This lot here (indicating). They had no business to move this fence here. Henry Jansand moved that wire off.

Q. When was that moved off?

A. About three months ago, I should say. I don't know exactly what date. I know Mr. Fletcher told me that they had pulled the posts down and hauled them away.

Q. Up to about three months ago the south half of that section was all fenced and had been used—

A. It is all fenced but eighty rods now.

Q. Now, Mr. Mooers, you have testified in regard to these allotments that were made in May, 1905, have you not?

A. Yes sir.

147 Q. I call your attention [—] the Plffs. Exs. 19 and 20. In whose handwriting are the words "Samuel E. Mooers"?

A. It looks like George A. Morrison's writing; it isn't mine.

Q. You see that mark there, it says "his mark"?

A. Yes sir, I see that mark.

Q. Did you put that mark there? A. No sir, never.

Q. Who was present here at the agency on May 15th when you were here to take allotments? A. On the reservation?

Q. No, here present with you when you were here at the agency? A. Theodore B. Beaulieu was with me.

Q. And who else?

A. I don't know as there was anybody else with me.

Q. I don't mean that came with you but who was present?

A. In the office?

Q. Yes, of the clerks?

A. Well, the Major was attending to the main part of it.

Q. And who else was here—anybody else?

A. Mr. Beaulieu and George A. Morrison.

Q. Anybody else?

A. I don't remember which of the two clerks that was over that day.

Q. Do you remember that Mr. Perrault and Mr. Morrison and Mr. Beaulieu and Mr. Michelet were here at the time with you? A. Yes sir.

Q. Now, was Exs. 19 and 20 made out at that time?

A. No sir, they didn't make them out right there. As they went along they just took a little slip and made the entry on them and then they was passed on and you passed out.

Q. On May 15th?

A. Any time that they made their allotments.

Q. Let me show you Plffs. Exs. 21 and 22. Was that made out at the same time?

A. Well, I took them all at the same time. I don't know whether they were made out at the same time or not. I made the selections.

Q. You made the selections at the same time that you made the selections when you—

148 A. Of course this on 2, whatever you have got there, that I didn't know anything about. I didn't make that selection on 2; I never saw that tract of land, but I applied for four eighties at that time.

Q. You applied for four eighties?

A. Yes sir; I got two of them.

Q. Did you apply for the northwest quarter of the southeast quarter and the southwest quarter of the southeast quarter of Section 28, town 145, range 42? A. Yes sir.

Q. Did you apply for the northeast quarter of the southeast quarter and the southeast quarter of the southeast quarter of section 2, town 142, range 39?

A. No sir, I never saw that piece of land. I never applied for that.

Q. Now, let me ask you: You were acquainted in the neighborhood of section 2, town 142, range 39, weren't you?

A. Yes sir.

Q. You had logged in that vicinity?

A. Not in that town, no, but I had been down to Mr. Fairbank's road, and I have been up the Elbow Lake road and that piece of land lies in between those two roads.

Q. You had been familiar with that country for years, had you not? A. Yes sir.

Q. You had cut timber there and hauled timber away from that section of country, hadn't you?

A. About six or seven miles south of there.

Q. You say you didn't put your mark here?

A. No sir, I didn't.

Q. Nor didn't sign Ex. 22?

A. No sir; didn't know anything about the allotment of land described in Ex. 22 being made at that time; no sir.

Q. Not until the fall of 1905? A. No sir.

Q. I believe you said you found out then that it had not been allotted correctly to you, the land you designated?

A. That is right.

Q. That was about November, was it, or October?

A. Yes sir, along in November.

Mr. Haupt: You never sign your name by a mark?

149 Witness: No sir.

Mr. Haupt: You write your name very readily?

Witness: Yes sir.

Q. Now, I call your attention to Plffs. Ex. 26 and ask you if you applied for the northeast of the southeast and the southeast of the southeast of section 28, town 145, range 42 for Alice Mooers? This appears to be allotted May 17, 1905. This is an application for additional allotment under the Steenerson act.

A. She has both additional allotments there. I applied for one.

Q. Did you apply for this land?

A. Is that the east half of the southeast—

Q. It is the northeast of the southeast and the southeast of the southeast. A. That is right.

Q. You did apply for that?

A. Yes sir.

Q. Did you apply for lot 1 in the southeast of the northeast of 2, town 142, range 39? A. No sir.

Q. For Lewis D. Mooers? A. No sir.

Q. So that you claim that at the agency here, so far as Exs. 24 and 22 are concerned, that the descriptions of land allotted to you were different from what you applied for?

A. Of that same one; that is 2, that is wrong.

Q. I say in those two applications for allotment, the descriptions were written in by some one differently from what you gave? A. Yes sir.

Q. Do you know whose handwriting that is, Ex. 22, the written part? A. No, I don't.

Q. And Ex. 21, or in Ex. 24 do you know whose handwriting that is?

A. It looks like Mr. Morrison's writing, but I wouldn't swear to it.

Q. Now, then, did you testify before Mr. Churchill that the officers here had put in wrong descriptions in the land that you had asked to have allotted in your application?

150 A. I don't know whether I said it was wrong; I told them, if I am not mistaken, that I didn't get what I applied for. I don't know whether I told them it was a wrong description or not but I didn't get what I applied for, that I surely told him.

Q. Did you say anything about the applications being made out differently from what had been designated by you so far as the descriptions of the land was concerned?

A. Why, that must have came up, sure.

Q. Well, did you tell him that?

A. Why, yes or this fight wouldn't have been on, I don't think, if I had been, because if I got what I applied for at that time, there wouldn't have been no scrap over this.

Q. Are you sure you told him that, that the descriptions had been made out wrong, differently from what you designated?

A. Yes sir, I am almost certain that he knew it and that I told him so.

Q. You are almost certain?

A. Yes sir, I am certain that he knew all about it.

Q. Are you certain you testified to it before him?

A. I wouldn't say so to that.

Q. And you say from the 15th day of May, 1905, up to the present time, you never had said a word to Maj. Michelet about any erroneous description in the allotments that you designated?

A. I don't know as I have direct to him, no sir.

Q. Did you ever say anything to Mr. Perrault or to Mr.—

A. George A. Morrison? Yes sir, I told George A. Morrison when he penciled it in my book that it was wrong, that I never applied for it.

Q. When did you tell him that?

A. That was the fall of 1905.

Q. You told him that? A. Yes sir.

Q. That these descriptions had been made out erroneously in the applications for allotments? A. Yes sir.

Q. Now, didn't you say to the inspector, in answer to
151 this question: "Do you know of any reason why another 160-acre tract which has not already been allotted, should not be allotted to your children upon request to the agent?" and didn't you answer, "I would not take other tracts until I find out why my children had not been allotted the lands selected for them in section 15." You testified to that, did you? A. Yes.

Q. Didn't you testify in answer to this question to the inspector: "Do you mean to say that if you didn't get the lands first selected by you that you would refuse to select other tracts?" and didn't you answer, "Not until I find out why they were not given the lands first selected for them."

A. Yes, that is the way I answered.

Q. (Ex. 28 shown witness.) Is that your handwriting?

A. Yes, that is my handwriting.

Q. (Plffs. Ex. 29 shown witness.) Is that your handwriting? A. Yes sir.

Q. Now, you knew that under the Act of 1889 that when you applied for an allotment there was a printed statement, partly written and partly printed, to this effect, did you not, "The lands above described is agricultural and not pine land. The above named person resides on the reservation." You knew that was on every—

A. Why, I don't know as I did. They were allotting this same kind of lands when I selected mine.

Q. I ask you if you didn't know that that was on every application for allotment under the Act of January 14, 1889, "The land above described is agricultural and not pine land." You knew that that was on there, didn't you, on these applications? A. I don't say that I ever noticed that on there.

Q. You made a number of these applications?

A. Yes, I made some, sure.

Q. And these two you made and signed?
A. Yes sir, I signed those all right.
Q. You signed them and left them in the office?
152 A. Yes sir; I left all the rest too. I haven't got any yet.

Mr. Edgerton: I offer these in evidence, Plffs. Exs. 28 and 29.

Objected to by defendant for the reason that they relate to land not in controversy here, different allottees, and because they were instruments made long prior to the Act of April 28, 1904.

Q. Now, Mr. Mooers, you say that on August 8, 1904, you made application to Mr. Perrault? A. Yes sir.
Q. For an allotment of the lands in controversy described in the complaint in section 15? A. Yes sir.
Q. For your minor children? A. Yes sir.
Q. Alice and Lewis. Now, you made those applications on just such blanks as these, didn't you, as Exs. 28 and 29?

Objected to by defendant for the reason that it is not the best evidence.

Q. Well, you knew that those applications were blanks just like these Exhibits 28 and 29, did you not?

Objected to as not proper cross examination.

A. Why, I guess that is all right, yes.
Q. You knew, Mr. Mooers, that those lands were timber lands? A. Yes sir.
Q. At the time you made those applications? A. Yes sir.
Q. Did you tell Mr. Perrault that they were timber lands?
A. No sir; he didn't ask me, either, he said he would allot me anything out there that was vacant.
Q. You didn't tell him that that statement, "The land above described is agricultural and not pine land" wasn't correct, did you? A. No sir.
Q. Never called his attention to that fact at all?
A. No sir.
Q. That they would not be allotted to you by him?

Objected to by defendant as not proper cross examina-
153 tion, and that the witness is not bound by what Mr. Michelet would or would not have done; that this legal rights are to be determined by what he did do and what legal results flowed from his acts.

A. He was allotting this same kind of land. I don't see why I should be turned down. There were some thirty-two or

thirty-four that went through and there was only two of them canceled.

Q. You claim that he made thirty—

A. Somewheres along there.

Q. Thirty allotments of timber land at that time?

A. Yes, something close to it. I think there was only one canceled besides these two.

Q. At that time?

A. Yes sir; I think Mr. Sweeney's was canceled.

Re-direct Examination

By Mr. Haupt:

Q. Mr. Mooers, to clear this up, state now what lands you designated about May 15, 1905, for an original allotment for Alice Mooers.

A. It was the east half of the southeast quarter of section 2-144-40.

Q. And what land did you designate as an original allotment for Lewis?

A. It was the east half of the northeast quarter of section 2-144-40.

Q. At the time when you designated those lands did you understand they were timber lands? A. In 2?

Q. Yes. A. Yes sir; it was hardwood.

Q. Was there anything said to Mr. Michelet at that time about what you would do concerning your selections of August 8, 1905, if you could get those lands? A. Yes sir.

Q. What was said in that regard?

A. If I got those, that was the end, that was my final selection, that I was willing to give up.

Q. What is your age?

A. I was forty-eight years old the 26th day of May.

154 T. B. Beaulieu, sworn on behalf of the defendant, testified as follows:

Examined

By Mr. Haupt:

Q. What is your name? A. Theodore Beaulieu.

Q. Where do you live? A. Right here at White Earth.

Q. How long have you been a resident of the White Earth reservation? A. About thirty-six or thirty-seven years.

Q. How old are you? A. I am fifty-four years old.

Q. You are a Chippewa Indian? A. Yes sir.

Q. Thoroughly acquainted here on the reservation?

A. Fairly acquainted, pretty well.

Q. Do you know Samuel E. Mooers? A. Yes sir.

Q. How long have you been acquainted with him?

A. As far back as I can remember, came up from Crow Wing county thirty years ago.

Q. Came up from Crow Wing county, did you? A. Yes.

Q. Were you present here in the agency office about the 15th day of May, on the occasion testified about by Mr. Mooers? A. It was on the 16th of May.

Q. Now, you may state what Mr. Mooers did at that time and how he did it in designating land to be selected as allotments for his two children Alice and Lewis.

A. They called me here to assist him, and I stepped upon a committee here at the time they were making allotments, and I was called up from there and I stepped up to the allotting-table and the plats were shifted right around to me, so I opened the plat of township 145, range 40. I had already given them the descriptions of what he wanted; and then he made his selections from them.

Q. In what manner did he make his selections?

A. Just simply took them from the plat and pointed to each forty he wanted to take or lots.

155 Q. Whose attention, if anybody's, in the office did he call to those selections as he pointed them out?

A. It was the agent, Mr. Michelet.

Q. What did Mr. Michelet do?

A. I suppose he made the allotments, because he made the "A's" on the forties that he pointed out, made a letter "A" on each forty.

Q. On each forty designated by Mr. Mooers?

A. On each forty designated by Mr. Mooers, yes.

Q. Can you tell the descriptions of land that Mr. Mooers designated? A. Yes sir.

Q. Give the description of the land that Mr. Mooers designated for an original allotment for Alice Mooers.

A. It was the east half of the southeast of 2, township 143, range 40.

Q. Give the description he designated as an allotment for Lewis Mooers, original allotment.

A. The east half of the northeast of section 2-143-40.

Q. Can you give the description of the land he designated as an additional allotment for Alice Mooers?

A. I didn't assist him in that.

Q. Oh, you didn't assist him in that? A. No.

Q. You didn't assist, then, in designating the additional allotment? A. No sir, just simply those two.

Q. Are you familiar with the land that was designated in section 2-143-40? A. Yes sir.

Q. What character of land is that?

A. It is kind of rolling and timber land, hardwood and a few scattering pine.

Q. How far is that land from the agency here?

A. Oh, I should judge that is about sixteen miles north.

Q. Did you hear anything said by Mr. Mooers at that time addressed to agent Michelet to the effect that if he could get that land that he would abandon his claim to the allotments in section 15?

A. No sir. Mr. Mooers told him if he could get
156 those—

Q. But you didn't hear him say that to Maj. Michelet?

A. But not to the agent.

Q. Plffs. Ex. 22, under date of May 15, 1905, purports to be an application under the Act of January 14, 1889, for an allotment to Lewis Mooers of the northeast of the southeast and the southeast of the southeast of section 2, town 142, range 39. Are you acquainted with that land? A. Yes sir.

Q. What is the character of that land?

A. That is very rocky, stony and brushy.

Q. Is there any timber on there of any value?

A. Very little scattering timber.

Q. Plffs. Ex. 20, dated May 15, 1905, purports to be an application under the act of January 14, 1889, for an allotment to Alice Mooers of the northwest quarter of the southeast quarter and the southwest quarter of the southeast quarter of section 28, town 145, range 42. Are you acquainted with the land? A. No sir, I am not.

Q. You are not acquainted with the land? A. No sir.

Q. The last two descriptions that I have read are the lands that were allotted to those two children as original allotments. Are those the lands that were designated by Mr. Mooers for that purpose, that is, lands in section 28-145-42 and lands in section 2-142-39? A. No sir.

Q. I believe you said you knew nothing about the additional allotments? A. Not the additional.

Q. You didn't take any part in the additional allotment?

A. No sir, not in his case.

Cross Examination

By Mr. Edgerton:

Q. You have taken quite an interest in this case on the side of Mr. Mooers, haven't you? A. No sir.

157 Q. Haven't you talked this over a good deal with Mr. Mooers? A. No sir.

Q. Wasn't your son attorney for Mr. Mooers for a long time? A. He represented him, yes sir.

Q. And he made pretty vicious attacks on Mr. Michelet's Department, didn't he? A. I suppose he did; I don't know

Q. And you knew he was doing it, didn't you?

A. No, I didn't.

Q. Well, have you heard that he did it?

A. I don't know as I did.

Q. Well, you know, as a matter of fact, that there has been a good deal of feeling on the part of your son against Mr. Michelet, don't you? A. Not in this matter.

Q. You don't think so? A. I don't think so.

Q. Isn't it a fact, Mr. Beaulieu, that you and your son were to receive $500 if this case was won by Mr. Mooers?

A. No sir, I wasn't to receive nothing for any single description that he wanted. I don't know what my son was going to receive.

Q. Were you present here on May 15, 1905? A. Yes sir.

Q. On the 15th and 16th? Didn't you mention the 16th in your direct testimony? A. Yes sir.

Q. Were you here on both days? A. Yes sir.

Q. Now, go on and tell us, to the best of your recollection, just what was done when these allotments were made.

A. Which ones?

Q. Well, the ones made in your presence when you were present. A. They were made on the 16th of May.

Q. They were made on the 16th? A. Yes sir.

Q. They were not made on the 15th? A. No sir.

Q. Well, then, did you have anything to do with these two that are dated the 15th? A. Which ones are they?

158 Mr. Haupt: Those were original allotments for Alice and Lewis.

Witness: Yes sir.

Q. Well, they are dated the 15th. A. That might be.

Q. Do you say they were not made until the 16th?

A. The 16th.

Q. So you say those two original allotments were dated back to the 15th do you, dated a day ahead of when they were made.

A. I don't say that. I say he made his application on the 16th.

Q. For these? A. Yes sir.

Q. Tell us just what was done. Let us see if I understand you right: you had nothing to do with any allotments for Mooers except those made on the 16th; is that right, of May, 1905? A. Yes sir.

Q. Now, tell us, then, just what was done.

A. Well, that day that he made his application?

Q. Yes, the 16th, the day you say.

A. He came up to the alloting table and called me up there to assist him and the plats were turned around in a book in the form of plats, and I opened the township that he wanted to locate, and he had the description and I showed him on the plats.

Q. What were the descriptions?

A. Lot 1 and the southeast of the northeast of section 2, town 143, range 40.

Q. That is what he applied for, is it? A. Yes.

Q. For which child did he apply for that?

A. That is for Lewis.

Q. What did he apply for for Alice?

A. The northeast quarter of the southeast quarter and the southeast quarter of the southeast quarter of section 2, township 143, range 40.

Q. That is what he told Michelet he wanted? A. Yes sir.

Q. Who was present besides Mooers and you and Michelet when he said that to Michelet?

A. I cannot recall them. There was quite a number of them there.

Q. Well, do you remember anyone?

A. Yes; some of the committee was there.

159 Q. Do you remember what ones?

A. Some of the committee.

Q. Do you remember what ones of the committee?

A. Yes, Thomas Swan, John Carl, Fred Smith; that is all I can recall.

Q. What do you say Michelet did when these two tracts were designated for those two children?

A. He made an "A" on those forties, on each one of those forties.

Q. And what else was done?

A. When he put them on the slips there he described them I suppose. He was doing some writing there.

Q. And on this writing he put the letter "A", did he?

A. He put the letter "A" on the forties that were pointed out on the plat.

Q. That is where he put the A's?

A. That is where he put the A's.

Q. Did he put any letter "A" on the piece he was writing on? A. I don't think he did.

Q. You didn't notice that whether he did or not?

A. He described it in some other way.

Mr. Haupt: Did he put that on with pencil or pen?

Witness: I think it was a red pencil.

Q. Now, Mr. Beaulieu, were you in the government employ at that time? A. Yes sir.

Q. And how long had you been in the government employ at that time? A. I think about fifteen years.

Q. If any allotments were made on May 15, 1905, you were not present were you? You didn't have anything to do with

them if any allotments were made on May 15, 1905, to the Mooers children Alice and Lewis, you had nothing to do with it? A. Not on the 15th.

Q. You only had to do on the 16th, you say? A. Yes sir.

Q. Now, did you have anything to do with any allotments on the 17th of May, 1905? A. I can't remember.

Q. I understand you to say something about that you
160 did receive some pay not for services in the case but for furnishing notes or minutes; was I right about that?

A. I didn't say I was to receive. He got these tracts allotted.

Q. Provided he got these tracts allotted, you was to receive some pay from him? A. Yes sir.

Q. How much pay were you to receive?

A. I suppose there was nothing said. I was getting as high as five and ten dollars for some tracts.

Q. And you were getting that pay when you were in the employ of the government, were you?

A. Not all the time, just in some cases.

Q. When you were in the employ of the government, you were getting pay from applicants for allotments?

A. Yes sir.

Q. And you except pay for this work, furnished [there] minutes, do you?

A. I have given it up now, it has been so long since I furnished them. It has been so long it is outlawed.

Q. You must have a shorter statute of limitations up here.

Mr. Haupt: You wasn't to get anything unless the allotments was made?

Witness: No sir.

Q. Now, Mr. Beaulieu, you say you were in the employ of the government fifteen years?

A. Yes sir. About fifteen.

Q. Prior to this time?

A. Up to last June a year ago.

Q. You had more or less to do with alloting lands, did you not?

A. Oh, I was just a little, parties that couldn't help themselves.

Q. Do you know of Maj. Michelet making allotments of timber land knowing that they were timber lands?

A. I couldn't say as to that.

Q. You knew that prior to April 24, 1905, that it was positively forbidden to allot timber lands to applicants for allotments, didn't you? A. No, I never knowed it.

Q. You were familiar with these allotment blanks, weren't you? A. Yes sir.

161 Q. In which it is stated that "The land above described is agricultural and not pine land," and those blanks were used entirely in the allotments under the Act of 1889?

A. It might have been because I never looked them over.

Q. You never looked over these allotment blanks in the fifteen years you were here?

A. No sir; I had no occasion to do it.

Samuel E. Mooers, Recalled on behalf of the defendant, testified:

Examined by Mr. Houpt.

Q. Mr. Mooers, do you want to make any correction in the description of any of the lands that you have referred to?

A. Yes sir, I would like to change the township.

Q. In which lands?

A. In the one I called 144; that is 143-40. I made a mistake.

Mr. Edgerton: Which one is that?

Witness: That is selections for the originals in that hardwood.

Mr. Edgerton: For which child?

Witness: For Alice and Lewis.

Mr. Edgerton: You want to correct both of those descriptions?

Witness: They are both in that one town. I gave the township as 144.

Mr. Edgerton: For both, did you?

Witness: Yes, they are both there.

Q. Did you make any selections in May at any time except when Mr. Beaulieu was present of original selections?

A. No sir. I put them all in at the same time, that one time, and that, I think was on the 16th. The 15th was on Monday; we didn't do nothing, we kept standing around.

162 I was promised to get in the first thing Monday morning but I didn't get in at all that day and I got them right after dinner on the 16th and I went home.

Q. You heard Mr. Beaulieu's testimony that he didn't take any hand in making the selections for additional allotments?

A. No sir, he took no hand in that.

Q. Did you make them all at the same time, additional and original? A. Yes sir, at the same time.

Q. You think you made them on the 16th?

A. On the 16th; I am almost certain it was on the 16th—Tuesday.

Q. Where did you go after making your selections on the 16th? A. I went back home.

Q. Were you here at the agency on the 17th?

A. No sir, I was not.

Q. Then you made no selections either on the 15th or the 17th?

A. No sir, I couldn't make them on the 15th. I couldn't get in. I made them on the 16th and went home.

Cross Examination

By Mr. Edgerton:

Q. You have stated that there were about this time, thirty timber tracts in that vicinity that were allotted by the agent to different parties. Now, state what descriptions those were and to whom they were allotted?

A. I couldn't do that, I couldn't describe them.

Q. Describe them the best you can?

A. I can't describe them.

Q. Give the names of the parties?

A. I couldn't do that, but I will tell you, it was a man that worked right in the office told me, that is all I know about it.

Q. That is all you know about it?

A. One of the clerks.

Q. One of the clerks told you. What clerk told you?

A. Will I give it?

Mr. Haupt: We object to the testimony because it now
163 appears that his testimony was hearsay and for that reason it is immaterial what clerk it was told him.

Mr. Edgerton: Then I think, Mr. Haupt, in justice to Mr. Michelet, that that all ought to be stricken out.

Mr. Haupt: Yes, I will consent that all the testimony in relation to those other timber allotments made about that time, to which the witness testified, is without any basis, being hearsay, and may all be stricken out.

Mr. Haupt: I will offer in evidence pages 1, 2, 3, 4, 5 and 6 of the government transcript of Departmental proceedings in the case of Alice Mooers and Louis F. Mooers against Edward L. Warren and Annie Fairbanks, being a decision of the Secretary Garfield on that controversy, dated May 13, 1907.

The same was marked Deft's Ex. E.

Objected to as immaterial and irrelevant.

Defendant rests.

Samuel E. Mooers, recalled, on behalf of plaintiff in rebuttal, testified:

By Mr. Edgerton:

Q. You testified to a conversation with Maj. Michelet at the warehouse on the evening of the 24th of April, 1904, after those allotments had been opened up, and you say that he told you—took you by the sleeve and led you off?

A. Yes, he took me by the sleeve and led me off, and he says, "I would like to speak to you."

Q. And he told you in that conversation to give up those allotments? A. Yes sir.

Q. And that you couldn't hold them anyway?

A. To give up those two.

164 Q. Those two allotments, the land in controversy in this action?

A. Yes; and that he would give me something as good or nearly as good.

Q. And you told him you were going to hold onto them?

A. Yes; I told him it looked strange—

Q. —as long as you had rye straw to hold onto? A. Yes.

Q. And that you swore and he swore?

A. Yes sir, that was right.

Q. And you had quite a little feeling over it, between you?

A. It was very short, it didn't take very long.

Q. Well, it got pretty hot?

A. Yes sir, I told him I wouldn't give it up, and he said, "You can do as you damn please, you will never win out before the department." I says, "You are not the department, not by a hell of a ways, you are not the department yet."

Q. Did you testify to that before Churchill?

A. I believe I did, yes sir.

Q. Are you sure of that?

A. Yes sir, I think that is all in, that is all straight goods, every word of it.

Q. Did you testify before Churchill in June, 1906, to that effect? A. I am almost certain that went in, yes sir.

Q. You used those words that you have used here?

A. Yes sir. I think that went in just exactly the same. That is the very words that was talked over.

J. E. Perrault, recalled on behalf of plaintiff in rebuttal, testified:

Examined by Mr. Edgerton:

Q. Did you hear Mr. Moore's testimony as to your having a little red book in your vest pocket?

A. I heard him say so, yes.
Q. That you kept memoranda on as to the applications for allotments? A. I heard him say so, yes sir.
165 Q. Did you ever have any such book?
A. I never owned a red book in my life.
Q. This is the only book that Mr. Haupt showed you when you were on the stand before?
A. That is the only book I ever had for allotments.
Q. Where is that book?
A. I don't know, sir.
Q. That is not a little red book, is it?
A. Well, it is a yellowish book, it isn't red.
Q. It is one of those memorandum-books?
A. That is the only one.
Q. Can you put that in your vest pocket? A. No sir.
Q. Did you ever carry it in your vest pocket?
A. No sir.

W. R. Morton, recalled on behalf of plaintiff, in rebuttal, testified:

By Mr. Edgerton:
Q. You have lived in this country how long, Mr. Morton?
A. Since about 1886, up in this part of the country.
Q. Have you surveyed a good deal during that time?
A. Yes sir, I have surveyed ever since I have been here; that is about all I have done.
Q. You have been over a great deal of land?
A. Yes sir.
Q. Do you know the character of the soil and value of the land in this country?
A. Well, I have been employed as a state examiner of land almost every time that there has been land examined in Becker county, since I have been in the country.
Q. You went over this land in Sec. 18 that has been mentioned here, the other day, didn't you? A. Yes sir.
Q. I wish you would state what kind of land that is.
A. Well, it is land that is designated as first-rate by the government.
166 Q. First-rate what?
A. First-rate agricultural land. That would be vegetable loam, sandy, [which] a clay sub-soil and land that can be reasonably drained. That would be first-rate land.
Q. And this is first-rate land in 18?
A. Yes sir, that is what we would designate that land, as first-rate.

Mr. Haupt: I move that the testimony of the witness be stricken out as incompetent, irrelevant and immaterial.

Simon Michelet, recalled, on behalf of plaintiff in rebuttal, testified:

By Mr. Edgerton:

Q. You heard the testimony of Mr. Beaulieu and Mr. Mooers in regard to the claim that they make, that on May 16th, 1905, Mr. Mooers designated that he wanted allotted lot 1, southeast quarter of northeast quarter of Sec. 2, town 143, range 40, to his son, Louis D. Mooers, and that the northeast quarter of the southeast quarter and the southeast quarter of the southeast quarter of section 2, town 143, range 40, to his daughter, Alice Mooers, and you heard Mr. Beaulieu state that you entered a letter "A" on these descriptions on the plat of that township at that time, did you not?

A. Yes sir, I heard his testimony.

Q. What are the facts in regard to that?

A. The facts are that if I entered any letters "AA" or letter "A" on any tract of land while making an allotment, it was making an additional allotment and not making an original allotment, because the letter "A" was used to show the difference between an original allotment and an additional allotment; and all allotments appearing as "A" stood for an additional allotment. When any supplemental original allotment was made the letters "SS" was put on the plat showing that it was a supplemental schedule allotment.

Q. That was the rule of the office that you strictly followed, was it?

167 A. Absolutely.

Q. Now then, did you, in making those allotments, allot the land that Mr. Mooers designated?

A. Yes sir, I did.

Q. And when he makes the claim that he designated lot 1 and the southeast of the northeast quarter of section 2-143-40 and the northeast of the southeast and the southeast of the southeast, Sec. 2, township 143, range 40, he must be mistaken.

A. He certainly must, because here is my own handwriting. It was made at the time on this memorandum showing the legal sub-divisions of the allotments that were made at that time for his additional allotment.

Q. You put it down there at the time in your own handwriting that he designated?

A. Yes sir, and there it is, right there, marked 30.

Q. You say in Plff's. Ex: 30 attached to Ex. 26 the written part there, "NE SE of the SE of 28-145-42 is in your handwriting and made at that time?

A. It is my handwriting and it was made at the time that this application was made. As soon as I made this slip in my handwriting, I sent it up to the clerk, who was sitting to my right, for him to write out this here application and the application was sent right up with this here application to have this here application filled out.

Q. From whom did you get that description northeast and southeast of the southeast of 28-145-42?

A. I got that from Mr. Mooers.

Q. At that time?

A. Yes sir, at that time.

Mr. Edgerton: I offer that exhibit 30 in evidence.

Q. I hand you Plffs. Ex. 31, and ask you in whose handwriting "Lot 1, southeast of northeast of sec. 2, township 142, range 39" is in.

A. That is in my handwriting.

Q. When was that made?

A. It was made on May 16, 1905, the date of this application.

Q. The date of the application, Plffs. Ex. 24?

A. Yes sir.

168 Q. How did you come to make those figures and words?

A. Well, this description, as shown on this slip, was pointed out to me on the plat. This plat, when it laid open, this description was pointed out to me by Mr. Mooers as the tract of land that he wanted.

Q. On that day?

A. Yes sir. Now, of course this description here (indicating) I can see how this description could be wrong. I can readily see how this could be made wrong, because you know the description, lot 1 and the southeast of the northeast is the particular forties that he wanted, that he claims he asked for, in township 143-40. It is possible when these here different people came in for allotments, they wanted to look over the plats. Then they would see one township and then they would see another and another, trying to find that which they wanted, because the pieces they wanted, sometimes had already been selected, and they would search to try to find something that they wanted. They had a large number of descriptions, and it is barely possible that during this time they were looking at different tracts of land and the township 142-39 was thrown open and that he mistook it for township 143-40, and made a mistake in the township, the way he did today, and pointed to those forties. That, of course, would give him the forties on the township plat that was thrown open. That mistake could have been readily made, because these descriptions and

lot 1, northeast and southeast, compared with this description; it is all the same, instead of town and range; that could easily be done. Now, you see that would be exactly on the same place, Mr. Edgerton (pointing on plat), as would show for township 143. Supposing he thought this was township 143-40, and he pointed to this particular piece here, that would compare exactly with the description that he claims there, but it shows the wrong town and range. The legal subdivision on the section and the section is the same as his description there only the town and range is different, and if this was thrown
169 open and if he was looking for town 143-40, and he pointed to this piece and says, "Those are the pieces I want," I would have taken first the legal subdivision and afterwards the town and range and would have got the town and range from the plat as it shows here, and that mistake could easily be made, but that is an honest mistake. But they way he claims with those others, the only thing I could have done would have been to have gone to work and have given him some lands he never asked for.

Q. In making that memorandum on there, lot 1, southeast, northeast, 2-142-39, how did you come to make that on Ex. 31?

A. I took it simply from the plat as he pointed out the 40's he wanted. I took it right from the plat at the time and took one application at the time. I made one of these here slips at the time. Say, he would ask for this particular piece, I would take this slip and put it on. The plats would be thrown open and Mr. Beaulieu would come up and point to the particular pieces they wanted.

Mr. Edgerton: I offer in evidence Plffs. Ex. 31, attached to Plffs. Ex. 24.

Q. Now, I call your attention, Maj., to Mr. Mooers' testimony in regard to his designation as additional of the southeast quarter 28-145-42 and his testimony, that instead of your allotting that as additional you allotted the west half of the southeast quarter of said section 28-145-42 as original. What have you to say in explanation of that?

A. Well now, I wouldn't want to testify positively that such an exchange might have been made in making the allotments, but I don't see how it possibly could be done. I would take the descriptions as they would come along. As they were pointed out to me on the plat, I would take the descriptions and write them down right in his presence.

Q. And you did the best you could?

A. I did the very best I could.

170 Q. With the honest intention of allotting them just as he had designated, did you?

A. Yes sir. Of course we worked hard during that alloting time working 15 and 16 hours a day, trying to accomodate those people. They would all come in and take the description and pick out what they wanted, and after we had given those descriptions to some people, they would return them, and I would have to go through the descriptions again and it was a tiresome, tedious, long work, and of course some errors must have and did creep in, but I don't see how it is possible to exchange those allotments because they were made on different dates. Two of those allotments were made in these allotting rooms and two allotments were made out there in the other room. I posted a notice to make additional allotments and made them in the front room, and didn't make additional allottments out there. I didn't make originals out there in the front room. But these applications were cleared up every single night so that there were no applications left over that could be dated anything except the date on which the application was made; and we checked our work up every night to see that our plats corresponded with our application, every night's work, and there could not be any left over and misdated; it was not possible to do it under the system I did it, because I checked my work up every night. We staid two or three hours after we got through allotting to see if we made any mistakes, and if we did, we tried to catch them, and they could not have been left over any other date, except what the application shows.

Q. So it was on May 15th, 16th and 17th, 1905?

A. Yes sir.

Q. Now, Maj., you heard read the testimony of Mr. Mooers in regard to certain conversations that he claims were had between you and him, in which he puts in a lot of swear words. Will you please state just what the fact is in regard to those conversations that he claims was had?

A. Well, as to the conversation he claims, on December 12, 1904: I couldn't place the date; I don't know whether
171 I had a conversation with Mr. Mooers on December 12th or not, but I think I had a conversation with him about that time. I stated, as he says, at that time, that I wanted him to make a selection, that he couldn't hold those allotments, that I wouldn't allot them to him, and that I had canceled them, and I had notified him of the cancellation of the allotments and told him I wouldn't make the allotments and urged him to make selections of his original allotments for his children, as I had urged him for four or five months. I had written letters urging him to come up here and take original allottments for his children, but I never could get him to do it. I sent him notice after notice and wrote him letter after letter,

asking him to come up and take his original allotment for his children.

Q. Did you do the same by him as you did by the others?

A. I did the same by him as I did the others. I was desirous of closing up this matter and I was urging on them to take their original allotments, and Mr. Mooers is one I couldn't get to do it.

Q. Did you have any intention of treating him different from other people entitled to allotments?

A. No sir, I did not. Now, in regard to that conversation, as to what took place, or as to certain words in that conversation, I wouldn't want to say, because I know I had some conversation with him, but I don't think there was any bad feeling of the past between us at that time.

Q. He has referred to another conversation here that he says took place at the warehouse in which he says a lot of swear words and profane words were used.

A. I never had any such conversation with Mr. Mooers; never had any trouble with Mr. Mooers at the warehouse on the evening of the allotting.

Q. You never had any such conversation on the 24th?

A. No sir, I did not.

Q. Or at any other time? A. No sir, I did not.

172 Q. Did he testify to anything of that kind before Mr. Churchill as he has testified to here?

A. No sir. Mr. Churchill showed me Mr. Moore's testimony and asked me questions in regard to it. This is the first I have heard of that conversation. And then, Mr. Churchill's record there will bear me out that no such testimony was given at the hearing before Mr. Churchill.

Q. I will hand you Plffs. Exs. 28 and 29.

A. And I think, furthermore, in regard to that matter, that he testifies that Ben Fairbanks and Ed. Warren was up in LaChappelle's store that evening of the allotting, on April 24th, and that I was in there, is a mistake, because I think probably Fairbanks and Warren were probably so tired that night they wouldn't have been in that store, and I certainly was so tired I wouldn't have been up in that store that evening because I had this strain on me all day Sunday and practically all Sunday night. There was trouble here and there was rumors that the Indians were going to shoot and all this and that and I had all that worry, and after I got through that night, I wasn't loafing up at LaChappelle's store. I never go up there; I am not up in that part of town once in six months. I certainly wasn't there that night.

Q. I hand you Plffs. Exs. 28 and 29, that have been offered in evidence, and ask you if pursuant to those applications, allotments were made.

A. Those were allotments that were made by the Chippewa Commission. They show what they are.

Q. What do the records of the office show?

A. Those are applications for original allotments to the Moores family—one to Samuel E. Moores himself and the other by Samuel E. Moores for his child, Chas. E. Moores. I can compare what they were really allotted for there, but I don't know anything about this, except the records in this office. They show for themselves what they are.

173 Q. See if the allotments were made?

Mr. Haupt: All testimony concerning Exs. 28 and 29, is objected to as involving land not in controversy here, and to children of Moores who are not interested in this litigation.

Q. When? A. On October 22nd.

Q. And November 5, 1905?

A. And November 5, 1905, yes sir.

Mr. Edgerton: You are willing to waive the ground of incompetency, aren't you?

Mr. Haupt: I objected to it on the general ground they are other lands and other people involved and it has nothing to do with this case. That is the only ground.

Q. Was it a practice of this office, when lands were cultivated or improved or fenced by the party entitled to allotment, when it was fenced to mark on the plats that the same was reserved for such people?

Objected to as incompetent, irrelevant and immaterial, unless it is shown that Moores had knowledge of such practice.

A. Yes, it was done, and done for the purpose that no allotments should be made to others when persons had improvements on, because under the Act of 1887, any person that had improvements on any particular piece of land had the right to claim that particular land in preference to anybody else.

Q. And that was the reason for that custom and rule of the office, was it? A. Yes sir.

Q. Is there any explanation that you want to give after you have heard the testimony of Mr. Moores in regard to this case and the conduct of your office?

A. I think not. I think I have covered everything I have got to say.

Mr. Edgerton: I want to introduce the evidence of Mr. Moores given before Mr. Churchill.

174 Mr. Haupt: That evidence of Mr. Moores is objected as being no part of this case. Mr. Moores has already been upon the stand and testified, and that [council] had before him, at the time that Mr. Moores testified, the testimony which he now offers and which he then had an oppertunity to use for the purpose of impeaching M. Mooers testimony therefrom, if he so desired; that testimony having been taken in another proceeding is incompetent, immaterial and irrelevant in this action.

Mr. Edgerton: I also offer in evidence the front page Ex. 32 a and Ex. 33, page 103 of the certified transcripts.

Mr. Haupt: I want to object to this testimony for the further reason that is does not appear that this testimony was ever read over to Mr. Moores so that he had an opportunity to correct it and it is not signed by him.

Edward Warren, Recalled, on his own behalf in rebuttal, testified:

By Mr. Edgerton:

Q. Were you down at LaChappelle's store the night of the 24th, of April 1905, with Maj. Michelet and Mr. Fairbanks?

A. I know I wasn't there with Michelet; I might possibly have been around town there with Fairbanks. I never saw Michelet there that night. We were pretty tired and I think we went to bed pretty early that night.

Mr. Edgerton: (To Mr. Fairbanks) Mr. Fairbanks, were you down there at LaChappelle's store on the night of April 24, 1905, with Maj. Michelet and Mr. Warren?

Mr. Fairbanks: No sir, I don't remember seeing Mr. Michelet there at all. I don't remember of being there at all.

Q. I will ask if either one of you saw Mr. Moores there that night.

A. I couldn't swear that I did, I don't remember seeing him. I don't remember of being there at that time.

175 Mr. Haupt: Both of those men might have been there and you not remember it?

Mr. Warren: Possibly. I didn't see him in that store. I don't remember of being in that store that night.

Mr. Haupt: That is quite a long while ago.

Mr. Warren: Yes.

Mr. Haupt: You would not pretend to go back several years and pick out any particular day and say who you saw and where you saw them [a] and what you did?

Mr. Warren: No sir.

Plaintiff rests.

Simon Michelet, recalled on behalf of defendant in surrebuttal, testified:

By Mr. Haupt:

Q. Turning to your plat book of 143-40, sec. 1, I believe you stated that on the application of Mr. Moores you allotted some land in sec. 1 to the children of his sister? A. Yes sir.

Q. Was that on the same day you made allotments to him?

A. Well, I wouldn't want to say until I look it up here. The allotments that were made to Mr. Moores' sisters children I think they are all her children. There is Jeannette, Paul, Claude, Carrie A., the mother, and Lottie Cooper. Allotments were made on May 16, to all of those children and to Mrs. Cooper. I think Mr. Moores there made the selections for them.

Q. On May 16th these allotments were made out of sec. 1, 143-40?

A. Some of those were in that township, yes sir. Claude Cooper's was in Sec. 1, 143.

176 Q. Some of them were made out of Sec. 1?

A. Yes sir.

Q. And that is the same day that Mr. Beaulieu says he designated the lands in Sec. 2 of that same town for allotments to the children of Mr. Mooers?

A. That is what he stated, on that date.

Q. Mr. Beaulieu is familiar with land matters and towns and ranges and sections and subdivisions of sections from his experience here, is he not?

A. Yes he is. I have had more complaints in regard to these allotments on the strength of what Mr. Beaulieu has told the Indians as to what lands they really selected than any men on the reservation.

Q. I see that pieces of land in Sec. 2 are marked with a letter "A" as Mr. Beaulieu stated? A. Yes sir.

Q. Do you know of any way Mr. Beaulieu had knowledge of that fact unless he had seen you put down the letters, as he stated?

A. Why, he had access to the plats at all times. He was an employe of the government at that time and was until the following first of July, I think.

Q. What were his duties in the office?

A. He was a government employe, looked after things that he was ordered to look after, and looked after issuing lumber to Indians.

Q. But his duties did not require him to make any inspection of the plats, did they?

A. At times they did, yes. He was required to go out and look up trespass and locate on what pieces of land buildings were located on, and if any dispute arose between Indians, why, he would go out and investigate it, use the plats to find out what the records were before he made his investigations.

Q. He would make those investigations himself from the plats, would he?

A. Yes, he would come to the plats and get what in-
177 formation he wanted, and then go and look them up.

Q. So his examination of plats made him familiar with the methods of doing business? A. Yes sir.

Q. And familiar with towns and ranges and sections?

A. Yes sir.

Q. Was Mr. Beaulieu here present, as he stated, and helped to designate these lands for Mr. Mooers?

A. I think he was. He assisted a large number of Indians in making selections every day during the alloting.

Q. And he designated the lands and you put down the descriptions?

A. Well, either he or Mr. Mooers. I think Mr. Mooers and Mr. Beaulieu were both there and Mr. Mooers and Mr. Beaulieu between them would point out what pieces they wanted me to allot to them.

Q. And they stated to you the town and range of the—

A. No, they didn't state the town and range; they would point—the plats would be turned over to Mr. Beaulieu and he would come there and find out what town and range he wanted and he would point to the particular 40's. Supposing this township 143 was turned up like that (illustrating), he would point to those two pieces there. I would take the subdivision down first on the slip, just as they pointed them out, and then I would look at the top of the plat here to see what town and range it was in.

Q. Then they would have to tell you the town and range in order that you could turn to the right township?

A. Well, they would point; they would turn to the town and range themselves and Beaulieu would find the town and range he wanted and would point to the particular piece he wanted and say, "I want those two forties", and I would take those subdivisions and put them down on this little memoranda slip on the back of the application and would take the town and range from the plat here.

Q. Lot 1 and the northeast of the northeast?

178 A. That would be lot 1 and the northeast of the northeast.

Q. You think they might have made a mistake in the town and range and got it in the other town and range?

A. Yes, might have got it in 143-39; the subdivisions are the same.

Q. Are those subdivisions marked with the letter "A" the same, 142-39? A. Yes sir.

Q. Are the four tracts marked with the letter "A"?

A. No, just one of them. The other one below that is a supplemental allotment. This here is Louis D. Mooers, original allotment, this one here, and the other one, this additional allotment, that he claims ought to have been in 143-40, joins on the north the original allotment of Louis Mooers in 142-39.

Q. There are 160 acres there, aren't there in Sec. 2?

A. Yes.

Q. And is the 80 acres marked additional?

A. The north 80 is marked additional, and the south 80 is marked "SS", being the supplemental original allotment of Louis Mooers.

Q. Now, turn to 145-42, Sec. 28, southeast quarter, I think; how is that marked?

A. One is marked an additional allotment and the other a supplemental original.

Q. Which is marked supplemental original?

A. The west half of the southeast of 28-145-42.

Q. Why do you call that supplemental original?

A. Because the Chippewa commission closed their work in July 21st, 1900, and sent on the schedules for approval.

Q. This is supplemental to their work?

A. Yes sir, this is supplemental to their work.

Q. Your explanation, then, of the land, in regard to 143-40 is, that they may have turned to the wrong town?

A. Turned to the wrong town and range.

179 Q. And by that means failed to get the land they intended to get as originals?

A. Yes sir, and if Mr. Moores had said something to me as soon as this was discovered, I would have tried to rectify it if there was any error on the part of this office, as I certainly wanted to give him the land that he wanted and had no possible object to give him anything else. The northeast of the southeast, section 2-143-40 is still vacant and not allotted.

A. S. King, sworn as a witness on behalf of defendant, in sur-rebuttal, testified:

By Mr. Haupt:

Q. Where do you live, Mr. King?

A. In Lake Park, Becker Co., Minnesota.

Q. How long have you resided there?

A. About eight years.

Q. What is your business? A. Attorney.

Q. How long have you been an attorney-at-law?
A. 25 years.
Q. Do you know Mr. Mooers? A. I do.
Q. Have you been retained by Mr. Mooers to assist in obtaining his allotments? A. I have.
Q. And are you now acting in that capacity? A. I am.
Q. Were you present on the occasion testified to by Mr. Mooers when he applied for the allotments in Sec. 15 on August 8, 1904? A. I was.
Q. Did you see him at that time when he presented his applications to the alloting-clerk, Mr. Perrault? A. I did.
Q. Did you notice Mr. Perrault at that time examine a book— A. I did.
Q. —to ascertain whether the lands were clear?
A. I won't say what he examined it for, but when he asked him about it, he took a little red book out of his pocket. It was a book exactly the size of the one I see the Major
180 have over there, and he took that little book out and he looked at it. I don't know what was in the book. He was on that side and I stood about there, (indicating) and I could see that there was writing in it what writing was in it, I don't know. He took that book and opened it and he says to Mooers, "You can have that piece." He took it out of his upper vest pocket. It was a little book like the one he has there.
A. A reddish-covered book, or brown?
A. It looked red to me; it was a reddish cast anyhow.
Q. About the size usually carried in the vest pocket?
A. Well, about the size of that book.
Q. And did he replace it in the same pocket?
A. I won't say where he put it; I believe he did. I won't say where he put his book when he got through, I didn't notice but—
Q. You saw the book shown here today in which a memorandum was found? A. It wasn't that book.

Cross Examination

By Mr. Edgerton:
Q. Mr. King, you say that was on August 8, 1904?
A. Yes sir.
Q. Has the matter of that book ever come up until today, since that time, been called to your attention until today?
A. Just as soon as we got out of there, Mr. Mooers spoke about it that same day.
Q. I mean since that day?
A. Not since that day.
Q. Until today?

A. Until today until that was brought up here today, the attention of that book has never been brought to my mind, no sir.

Defendant rests.

181 J. E. Perrault, recalled on behalf of the plaintiff, testified:

Examined by Mr. Edgerton:

Q. Mr. Perrault, I want to ask you one more question. Calling your attention to August 8, 1904, when Mr. Mooers made those applications for allotments for his minor children, Alice and Louis, was Mr. King present?

A. I never saw Mr. King until after Joe Louzon was killed, when he came up to sell wood and hay.

Q. When was that?

A. That was in the spring of 1905, in March. That is the first time I ever saw Mr. King in my life.

A. S. King, recalled on behalf of the defendant, testified:

By Mr. Haupt:

Q. Mr. King, you heard the statement made by Mr. Perrault just now? A. Yes sir.

Q. Have you any way by which you can fix in your mind definitely the fact of your being present, as you formerly testified?

A. Yes sir. I advised Mr. Mooers to have that timber-tract surveyed and estimated in 15 to select it as an original allotment, or allotment for his children. He said to me that the agent wouldn't allot pine lands, and I told him I had no doubt that the department had ordered him not to allot them, but that I saw nothing in the law that would prevent him from taking a pine claim. I framed a written demand for the pieces in question in 15 and came with Mr. Mooers here to make the request for his allotment and had it in my pocket and stood by Mr. Perrault when that allotment was made.

Q. You were present with Mr. Mooers then?

A. Yes sir.

182 [—] For the purpose of serving that demand on him to make allotment in case he refused?

A. Yes sir, just as I have stated.

Mr. Perrault: How could that have been when you say that Maj. Michelet wouldn't allow it?

Witness: I said Mr. Mooers said he wouldn't allot it. I said he had told me that Maj. Michelet wouldn't allot pine lands.

Mr. Perrault: I never saw you.

The further taking of testimony was adjourned until further notice.

183 On November 25th, 1907, pursuant to understanding had at the time the evidence was taken, Mr. Edgerton offered in evidence a certified copy of a letter dated Nov. 8, 1905, by C. F. Larrabee, acting commissioner of Indian affairs, addressed to the U. S. Indian agent at White Earth, Minn. Said letter is marked Plff's. Ex. 34.

Mr. Haupt objected on the ground that it is incompetent, immaterial and irrelevant and it being no more than an expression of the opinion of the commissioner on the particular case under consideration.

184 Plffs. Ex. 1.

White Earth, Minn., June 29, '04.

Simon Michelet,
U. S. Indian Agent,
White Earth, Agency, Minn.

Sir:

I hereby make application for additional eighty acres of land to be allotted to each of minor children, who are Mississippi Indians and entitled to such allotment under the provisions of the Steenerson Act, the following described land:

Gracie Fairbanks,
NE/4 of SW/4 and NW/4 of SE/4 Sec. 1, Town 142, Range 42.
Gus P. Fairbanks, W/2 of SW/4, Sec. 1, Town 142, Range 38.
Everet W. Fairbanks, E/2 of SW/4 Sec. 1, Town 142, Range 38.
Annie Fairbanks, W/2 of NW/4 Sec. 15, Town 142, Range 39.

Yours respt.

B. L. FAIRBANKS.

185 Land—
38578—1904.

Plffs. Ex. 2.

Department of the Interior.
Office of Indian Affairs,

Washington, June 14, 1904.

Simon Michelet, Esq.,
United States Indian Agent,
White Earth Agency, White Earth, Minn.

Sir:

There is sent to you herewith for your information and guidance an approved letter of instructions of this office,

dated June 7th, 1904, directing you to make the additional allotments to the Mississippi Chippewas on the White Earth Reservation, provided for by the Act of Congress approved April 28th, 1904 (Public No. 218) known as the "Steenerson Act." As you will see the letter of instructions was approved by the Secretary of the Interior on June 10th.

If in the course of making the allotments therein referred to you will need further instructions upon any point you should make request for the same.

Please acknowledge receipt of the letter of instructions.

Very respectfully,

(Signed) A. C. TONNER,
Acting Commissioner.

McP—WDW.

186

Plffs. Ex. 3.

Department of the Interior.
Land Office of Indian Affairs,

36843-1904 Washington, June, 7th, 1904.

Simon Michelet, Esq.,
U. S. Indian Agent White Earth Agency,
White Earth, Minn.

Sir:

The Act of Congress approved April 28th, 1904 (Public No. 218), known as the "Steenerson Act," provides that the President of the United States is hereby authorized to allot to each Chippewa Indian, now legally residing upon the White Earth Reservation, under treaty or laws of the United States, in accordance with the express promise made to them by the Commission appointed under the Act of Congress entitled "An Act for the Relief and Civilization of the Chippewa Indians in the State of Minnesota," approved January 14th, 1889, and to those Indians who may remove to said Reservation who are entitled to take an allotment under article 7 of the treaty of April 18th, 1867, between the United States and the Chippewa Indians of the Mississippi, one hundred and sixty acres of land. This Act also provides that where an allotment of less than 160 acres has heretofore been made, the allottee shall be allowed to take an additional allotment, which, together with the land already allotted, shall not exceed 160 acres, and that if there is not sufficient land in the Diminished White Earth Reservation subject to allotment to give each Indian entitled thereto an allotment in quantity as provided in the Act, then the lands shall be pro rated among the Indians.

187 The president has designated you to make the additional allotments provided for in said Act. The following instructions are therefore given you in the premises.

It is held that only the Mississippi Chippewas are beneficiaries under said Act, that it, those Indians to whom express promises of allotments of 160 acres were made by the original Chippewa Commission, viz, the White Earth Mississippi Chippewas and the Gull Lake Mississippi Chippewas residing on the White Earth Reservation.

2nd. To those Indians of the Mississippi bands who may remove to the White Earth Reservation, and who are entitled to take allotments under article 7 of the treaty proclaimed April 18th, 1867, viz, Gull Lake Mille Lac, and White Oak Mississippi Chippewas. But in order for these Indians to be entitled to the additional allotment provided for in the Act, they must have actually removed to the White Earth Reservation with the bona fide intention of making that Reservation their permanent home. The Indians of none of the other bands are entitled to additional allotments under said Act.

It is supposed that the Rolls of your Agency will enable you to determine just what Indians are entitled to additional allotments of land under said Act, and under these instructions. But in making these additional allotments the usual rule and practice of this Office must be observed, viz: the Indians must be in being at the time the allotment is made or assigned to him; Or in other words, no allotment can be made to a dead Indian.

As you are aware, very many of the White Earth Mississippi Chippewas have already received allotments of 160 acres, or approximately 160 acres, under the "Cultivation clause" of article 7 of the treaty promulgated April 18th, 1867. Additional allotments cannot be made such allottees. But where the allottee has received less than 160 acres he can be
188 given additional land conforming to the leagl sub-divisions approximating 160 acres.

As you will note the Act provides that if there is not sufficient land on the Diminished White Earth Reservation subject to allotment to give each Indian entitled thereto 160 acres, then the lands shall be pro rated among those entitled to allotments. It will therefore be necessary for you to first determine, so far as you can by computation, whether there will be land enough on the Diminished Reservation to give each Indian entitled thereto, an allotment of 160 acres. In case there is not, then the lands will have to be prorated among the Indians, but in pro rating the land it will still be necessary to adhere to legal subdivisions of not less than 20 acres, or legal sub-divisions designated as Lots, which may contain less than twenty acres. That is, the allotments should be made upon the basis of giving each Indian approximately 100, 120, 140 or 160 acres of land, as the case may be.

These additional allotments must be made on a separate schedule by bands, following the numerical order of the original allotments under the Act of January 14th, 1889. The left hand column of the allotted sheets should be divided, making two columns. The first column should run in numerical order, 1, 2, 3, 4, etc. In the second column you should place in red ink the allotment numbers of the allottees as they appear on the original schedule. This rule is necessary to facilitate a ready reference to the original allotments. In other respects the allotments will be recorded on the schedule as though they were original allotments. The column for remarks can be used for additional notations. The first sheet of the schedule, however, should be properly headed in accordance with the provisions of said Act and the instructions given you hereunder.

You will accordingly upon receipt of these instructions and in connection with your other duties, proceed to make the additional allotments provided for by said Act of April
189 28th, 1904, subject to the instructions herein contained.

Should you need additional instructions, upon any features of the work, you should make request for the same.

You will please acknowledge receipt of these instructions.

Very respectfully,

(Signed) A. C. TONNER,
Acting Commissioner.

OMM-H Department of the Interior, Washington, D. C. June 10th, 1904.

Approved—E. A. Hitchcock, Secretary.

190 Pltfs. Ex. 12.

(Stub). Additional Allotment.

White Earth, Minn. Apr. 24, 1905.

Name of Allottee, Annie Fairbanks, 1244 W. E. Miss.

Description of Land. NW/4 of NW/4 SW/4 of NW/4)80 Sec. 15, Town 142, R'ge 39, No. 25.

Pltfs. Ex. 4.

Application for Additional Allotment.

White Earth, Minn., Apr. 24, 1905.

The undersigned, A. W. E. Miss. Chippewa Indian, No. 1244, of Pay kin ah waush band, schedule No. 1161, White Earth Agency, hereby makes application, under Steenerson Act of April 28, 1904, (33 Stats. 539) for an additional allotment to

Annie Fairbanks of the following described land: NW/4 of NW/4 and SW/4 of NW/4 Sec. 15, Town 142, Range 39, containing 80 acres.

her.
Signed, Annie Fairbanks X
mark.

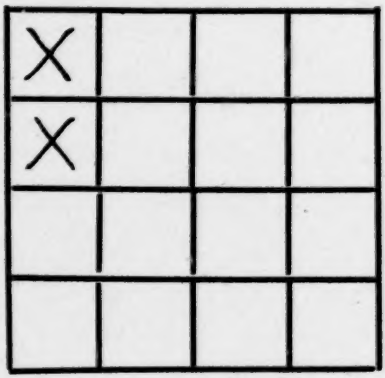
I witness the above signature. The land above described is agricutural and not "pine" land. The above named person resides on the ..... No. 25.

Plffs. Ex. 5.

Name: Annie Fairbanks.
Roll No. 1244 WE.
Band: Pay kin ah waush.
Schedule No. 1161.
No. Acres: 80.

191 Plffs. Ex. 6.

Name, Annie Fairbanks, Date, April 24, 1905. Sec. 15, Tp. 142, R. 39



W½ NW¼
(In red pencil) NW¼ of NW¼ SW¼ of NW¼ 15-142-39.

192 Defts. Ex. C.

(Stub) Allotment, White Earth, Minn., August 8, 1904.

Name of Allottee, Alice Mooers, 5yrs. 01, 1903, No. 238 G. L. Roll 1903.

Description of land, E½ of NW, Sec. 15, Town 142, R'ge 39, No. 278.

(In red ink) Restored 46254-1907, May 18, 1907, Void, Cancelled by order of Agent.

Defts. Ex. D.

Application for Allotment,
White Earth Agency, Minn.,
August 8, 1904.

The undersigned a Removal Gull Lake Mississippi Chippewa Indian, No. 238-1903, of John Bad Boy's band, in Minnesota, hereby makes application, under Act of January 14, 1889, for an allotment to..... Alice Mooers 5 F in 1903 of the following described land: E½ of NW/4 Sec. 15, Town 142, Range 39, containing 80 acres. Of this tract no acres were under cultivation.

Signed, Sam. E. Mooers, Father,

I witness the above signature. The land above described is agriculture and not "pine" land. The above named person resides on the Reservation. No. 278.

(In red ink). Restored 46254-1907, May 18-1907. Void, ordered cancelled by agent.

193 Defts. Ex. B.

Allotment.

Stub. White Earth, Minn., August 8, 1904.

Lewis Mooers, born Apr. 4, 1900. No. 239 G. L. Roll 1903.

Description of land. W½ of NW Sec. 15, Town 142, R'ge 39, No 279.

(In red ink) Restored Authy 46254-1907, May 18-1907. Void Cancelled by order of Agent.

Defts. Ex. A.

Application for Allotment.

White Earth Agency, Minn.,
August 8, 1904.

The undersigned, a Removal Gull Lake Mississippi Chippewa Indian, No. 239 of John Bad Boy's band in Minnesota, hereby makes application, under Act of January 14, 1889, for an allotment to .....Lewis Mooers: Born April 4, 1900 of the following described land: W½ of NW/4 Sec. 15, Town 142, Range 39, containing 80 acres. Of this tract no acres were under cultivation.

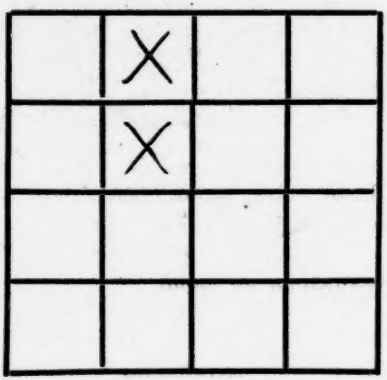
Signed, SAM. E. MOOERS, Father.

I witness the above signature. The land above described is agricultural and not "pine" land. The above named person resides on the Reservation. No. 279.

(In red ink). Restored Authy 46254-1907, May 18, 1907, Void cancelled by order of Agent.

194 Plffs. Ex. 10.

Name: Edward L. Warren, Date April 24th, 1905. Sec. 15, T. 142, R. 39.



E½ of the NW¼.

(In red pencil) NE/4 of NW/4, SE/4 of NW/4 15-142-39.

Plffs. Ex. 7.

Cass Lake, Minn., June 30th, 1904.

Maj. Simon Micholet, U. S. Indian Agt.
White Earth, Minn.

Dear Sir: I do hereby make application for my additional allotment of land, under the provision of the "Steenerson Act," the following described land, viz: The E/2 of the NW/4 of Section 15, Township 142, Range 39, containing eighty acres, embraced within the boundrays of the White Earth Indian reservation, in the State of Minnesota.

Very respectfully yours,

E. L. WARREN.

195 Plffs. Ex. 11.

Stub. Additional Allotment.

White Earth, Minn. April 24, 1905.

Name of Allottee, Edward Warren, 1490 W. E. Miss.

Description of land, NE/4 of NW/4 SE/4 of NW/4)80 Sec. 15, Town 142, R'ge 39. No. 23.

Plffs. Ex. 8.

Application for Additional Allotment.

White Earth, Minn., Apr. 24, 1907.

The undersigned, a W. E. Miss. Chippewa Indian, No. 1490, of Fred Jackson's band, schedule No. 1379, White Earth Agency, hereby makes application under Steenerson Act of April 28, 1904, (33 Stats. 539) for an additional allotment to Edward Warren of the following described land: NE/4 of NW/4 and SE/4 of NW/4 Sec. 15, Town 142, Range 39, containing 80 acres.

Signed EDWARD WARREN. X his mark.

I witness the above signature. The land above described is agricultural and not "pine" land. The above named person resides on the ..... No. 23.

Plff. Ex. 9.

Name: Edward Warren.
Roll No. 1490
Band: Fred Jackson's
Schedule No. 1379
No. Acres: 64.75.

196 Plffs. Ex. 13.

Refer in reply to the following:

Department of the Interior,
Land Office of Indian Affairs,
26804-1906. Washington. March 31, 1906.

The U. S. Indian Agent,
White Earth Agency, Minn.

Sir:

The office is in receipt of your letter of March 23, referring to Office letter of February 20, in the matter of the protest of Samuel E. Moores (or Mooers) against your action in cancelling the original allotments granted his minor children, Alice

and Louis, under the Act of January 14, 1889, and granting the same land to B. L. Fairbanks and E. L. Warren under the "Steenerson Act."

Answering your letter, I have to say that the explanation you make is not satisfactory and did not justify you in cancelling the original allotments to Mr. Mooer's children. The act of your alloting clerk was your act and should be so regarded. Accompanying the original papers is an affidavit from Mr. Perrault, your allotting clerk, to the effect that on August 8, 1904, he made the allotments in question and that later (date not stated) you ordered him to cancel them because they were "pine lands." There is also an affidavit of Theo. B. Beaulieu to the effect that previous to August 8, 1904, you had made allotments of pine lands to other Indians and had allowed them to stand.

It is true that in the early work of the Chippewa Commission in making allotments on the White Earth Reservation the Office did direct that only agricultural lands should be allotted, reserving the pine lands for the common benefit of all the Indians of the reservation; but after the passage of the
197 Steenerson Act, which contemplated the allotment of all the lands of the reservation, such instructions necessarily could have no application. If the affidavit of Beaulieu, above referred to, be true you had ignored the instructions yourself in making other allotments.

Believing that the original allotments were made in good faith and that the allottees acquired equitable rights thereunder, you are directed to allot again to Mr. Mooers children the lands originally granted them; namely, to Alice the E/2 of the NW/4 of Sections 15, Twp. 142, R. 39, and to Louis the W/2 of the NW/4 of said section.

Fred J. Beaulieu who submitted Mr. Mooers protest will be advised that you have been directed to take this action. When the allotments have been made as directed you are requested to report the fact to the Office.

Very respectfully,

(Signed) F. E. LEUPP
Commissioner.

McP-HJS.

198 Pltffs. Ex. 14.

Department of the Interior.
Land United States Indian Service,
54980-1906. Washington.

July 13, 1906.

The United States Indian Agent,
White Earth Agency, Minn.

Sir:

The Office is in receipt of a letter from the Secretary of the Interior, dated June 29, 1906, submitting an abstract of In-

spector Churchill's report in the matter of the contest between Samuel E. Mooers, on behalf of his two minor children, Alice and Lewis, and Edward L. Warren and B. L. Fairbanks, the latter on behalf of his minor daughter Annie, for certain lands on the White Earth Reservation.

After what appears to have been a careful and thorough investigation of the controversy, the Inspector expresses the opinion that the additional allotments made to Edward L. Warren and Annie Fairbanks should stand as made, and that other lands should be allotted to the Mooers children.

In view of Inspector Churchill's report and recommendation, you will disregard the instructions given you in Office letter of March 31, 1906, to cancel the additional allotments made to Edward L. Warren, and Annie Fairbanks, namely, to Warren the E/2 of NW/4 of Sec. 15, T. 142, R. 39, and to Annie Fairbanks the W/2 of NW/4 of said Sec. 15. These additional allotments will therefore stand as made, and you will allot other suitable lands to the children of Samuel E. Mooers. You are requested to inform all the parties in interest of this ruling.

Very respectfully,

(Signed) C. F. LARRABEE,
Acting Commissioner.

McP-Ph.

199 Plffs. Ex. 15.

Department of the Interior.

Washington, June 29, 1906.

The Commissioner of Indian Affairs.
Sir:

I transmit herewith, for your information, the transcript of testimony taken by Inspector Frank C. Churchill, in the matter of the contest between Samuel E. Mooers, on behalf of his two minor children, on the one side, and Edward L. Warren and B. L. Fairbanks, the latter on behalf of his minor daughter, Annie, on the other.

In a report to the Department under date of June 20, 1906, the Inspector states:

All the parties in interest are mixed blood Chippewa Indians, but they are practically white persons, as to appearance and knowledge of affairs.

Under the original allotment Act, eighty acres of land was allotted to each member of the Chippewa tribe, and an additional eighty acres was given under certain conditions based upon improving the lands. So that thrifty Indians received 160 acres all at once. In the year 1904 the so-called Steenerson Act passed providing for the allottment of eighty acres

in addition to the original eighty above mentioned, to the end that each member of the tribe should have 160 acres.

The allotting under this last named Act was placed in the hands of the United States Indian Agent, and he gave notice that the allotting would begin on April 24, 1905.

It will be readily understood that on a reservation where nearly one-half of the land had already been allotted, the remainder would vary greatly in character and value. Probably the most valuable lands remaining in this case, were those having a heavy growth of pine, consequently timber lands were coveted by many of those entitled to the additional eighty acres each, although I have heard of cases where the Indians preferred agricultural lands, or lands adjoining their original allotment, that were not considered timber land.

The Indian Agent states, and I have every reason to believe that his statement in the matter can be relied on, that while numerous persons appeared prior to the day set for beginning the allotting and designated the particular lands they desired, he invariably informed them that no lands would be set apart in advance, and that all must take their chances alike. Samuel E. Mooers, on behalf of his two minor children (four other children had already been allotted) was desirous to obtain pine lands and ascertained where a good quarter section could be found; then filed with an Agency Clerk a memorandum giving the physical descriptions of the land wanted.

200 The Indian Agent states that upon finding that this memorandum had been filed, he notified Mooers that the land would not be allotted to his children on account of it, but that he must come in with the rest at the proper time and take his chances with the rest.

I find that E. L. Warren, for himself, and B. L. Fairbanks, on behalf of his minor daughter, Annie, filed similar applications to that of Mooers, and upon the same land, and received the same information from the Agent as that given to Mooers. The allotting was advertised for Monday, April 24, 1905. Several hours before the time set for beginning the allotting, a line was formed in front of the agency, and B. L. Fairbanks was in that line very early, and E. L. Warren was immediately behind him. They each selected one of the two eighty acre tracts that Mr. Mooers wanted. The testimony shows that Mr. Moores was at the Agency, arrived on Sunday, the day before the allotting began, but he did not take his place in line until quite late, if at all, but seems to have relied upon the fact that he had designated to a clerk at the Agency the particular lands which he desired, even after he had been told that the selections would not be recognized as against other claimants.

It will be observed that the Indian Agent testified that the Mooers family have four allotments of pine lands, and in this connection attention is invited to the statement of Irvine P. Gardner, a surveyor and timber estimator. A close scrutiny of Mr. Mooers' testimony will disclose that he has tried to deceive me or is ignorant of the kind of lands in the possession of himself and family. It will also be found that Mr. Mooers has been engaged in logging which would make him familiar with timber lands.

The Agent shows that all the lands to which the Mooers are entitled, has been allotted and that they were selected by Mooers himself.

This too, is denied by Mooers which again shows a desire to deceive me as of course the allotments are all a matter of record.

My opinion is that Mr. Mooers has had his day in Court so to speak; that he has been treated fairly and has no real cause for complaint. I find 51 persons named Warren, and nine persons by the name of Mooers have secured allottments. The allottments to Edward L. Warren and Annie Fairbanks should stand as made."

The papers forwarded to the Inspector with your letter of May 24, 1906, are herewith returned.

Very respectfully,

E. A. HITCHCOCK, Secretary.

6002 Ind. Div. 1906.
9 enclosures.
JES.

201

Plffs. Ex. 16.

Land
27839-1892

Department of the Interior.
Office of Indian Affairs,

Washington, August 31, 1892.

Hon. Darwin S. Hall,
Chairman, Chippewa Commission,
Detroit, Minnesota.

Sir:

I am in receipt of your communication of July 30, 1892, referring to the letter of William F. Campbell relative to the refusal of the Chippewa Commission to allot him certain pine lands on the White Earth Reservation, in Minnesota, which letter was referred to the Chippewa Commission for report July 18, 1892. Your letter sets forth the reasons of the Commission for refusing to allot pine lands to the Chippewa Indians on the White Earth Reservation.

In reply to your request to be advised whether or not this office concurs in the position the Commission has taken in re-

fusing to allot pine lands to the Chippewa Indians on the White Earth Reservation, I have to inform you it does.

The pine lands, or lands valuable chiefly for the pine timber standing and growing thereon, should be reserved from individual allotment for the common benefit of all the Indians of the Reservation, unless there should not be sufficient land, aside from the timber lands, to make the allotments to all the Indians entitled thereto, in which event the matter should be presented to this office for proper consideration and instructions:

Very respectfully,

R. V. BELT,
Acting Commissioner.

(McPherson)

202 Plffs. Ex. 18.

Land— Department of the Interior.
46254-1907 Office of Indian Affairs.
Washington.

May 18, 1907.

Superintendent in charge White Earth Agency, Minnesota.
Sir:

On April 23 Paul E. Sleman, Attorney for Samuel E. Mooers, appealed to the Secretary of the Interior from the decision of this office of July 13, 1906, in White Earth contested allotment case between Samuel E. Mooers, on behalf of his two minor children, Alice J. and Lewis D., and Edward L. Warren and B. L. Fairbanks, the latter in behalf of his daughter, Annie, involving the E/2 of the NW/4 and the W/2 of the NW/4 of Section 15, Twp. 142, R. 39. On April 29 all of the papers in the case together with Mr. Sleman's letter, motion for review, and breif and argument were submitted to the Assistant Attorney-General for this Department.

The Office is now in receipt of a reply from the Secretary of the Interior, dated May 13, reversing the said decision of this Office of July 13, 1906, and directing that the tracts in question be reallotted to Alice J. and Lewis D. Mooers, and that the allotments of Edward L. Warren and Annie Fairbanks for said tracts be cancelled. If other tracts have been allotted to the Mooers children because of the decision of this Office of July 13, such allotments will be cancelled in order that the original allotments may stand. You will therefore cancel the said allotments to Edward L. Warren and Annie Fairbanks and reallot these lands to Alice J. and Lewis D. Mooers, as directed by the decision of the Secretary. You are requested to inform all the parties in interest of the decision of the
203 Secretary in this case. For further information a copy of the Secretary's decision is sent to you herewith.

Please acknowledge receipt of these instructions and advise the Office of your compliance with the order of the Secretary.

Very respectfully,

(Signed) C. F. LARRABEE,
Acting Commissioner.

McP.—HJS.

204 Plffs. Ex. 19.

(Stub).

Allotment.

White Earth, Minn.,
May 15, 1905.

Name of Allottee in 1904.
Alice Mooers 6 years, 233 G. L.—1904.

Description of Land.

NW/4 of SE/4 and SW/4 of SE/4 } 80

Sec. 28 Town 145 R'ge. 42.
No. 428

Plffs. Ex. 20.

Application for Allotment.

White Earth, Minn., May 15, 1905.

The undersigned, a Gull Lake Miss. Chippewa Indian, No. 233, of John Bad Boy's band in Minnesota, hereby makes application, under Act of January 14, 1889, for an allotment to Alice Mooers, 6 yr. in 1904 of the following described land: NW/4 of SE/4 and SW/4 of SE/4 Sec. 28, Town 145, FRange 42, containing 80 acres. Of this tract no acres were under cultivation.

(Signed) SAM E. MOOERS X His mark.

I witness the above signature. The land above described is agricultural and not "pine" land. The above named person resides on the Reservation. No. 428.

205 Plffs. Ex. 21.

(Stub). Allotment. White Earth, Minn., May 15, 1905. Name of Allottee Lewis Mooers, 4 yr. in 1904, 234 G. L.-1904.

Description of Land. NE/4 of SE/4 and SE/4 of SE/4 } 80

Sec. 2, Town 142, R'ge 39, No. 429.

Plffs. Ex. 22.

Application for Allotment.

White Earth, Minn., May 15, 1905.

The undersigned, a Gull Lake Miss, Chippewa Indian, No. 234, of John Bad Boy's band, in Minnesota, hereby makes application, under Act of January 14, 1889, for an allotment to Lewis Mooers 4 yr. in 1904 of the following described land: NE/4 of SE/4 and SE/4 of SE/4 Sec. 2, Town 142, Range 39, containing 80 acres. Of this tract no acres were under cultivation.

(Signed) SAM E. MOOERS, X His mark.

I witness the above signature. The land above described is agricultural and not "pine" land. The above named person resides on the Reservation No. 429.

206 Plffs. Ex. 23.

(Stub). Additional Allotment. White Earth, Minn., May 16, 1905.

Name of Allottee, Lewis D. Mooers, 234 G. L.

Description of Land, Lot 1 and SE of NE 79-73/100 Sec. 2 Town 142 R'ge 39 No. 572.

Plffs. Ex. 24.

Application for Additional Allotment.

White Earth, Minn., May 16, 1905.

The undersigned, a G. L. Chippewa Indian, No. 234, of John Bad Boy's band, schedule No....., White Earth Agency, hereby makes application, under Steenerson Act of April 28, 1904 (33 Stats. 539), for an additional allotment to Lewis Mooers of the following described land: Lot 1 and SE of NE Sec. 2, Town 142, Range 39, containing 79.73 acres.

(Signed) LEWIS D. MOOERS, X his mark.

I witness the above signature. The land above described is agricultural and not "pine" land. The above named person resides on the.....No. 572.

(Attached) Plffs. Ex. 31.

Name: Lewis Mooers	Lot 1
Roll No: 234 G. L.	SE of NE.
Band: John Bad Boy	2-142-39
Sch. No:	
No. Acres:	79.73

Plffs. Ex. 25.

207 (Stub). Additional Allotment.

White Earth, Minn., May 17, 1905.

Name of Allottee, Alice Mooers, 233 G. L.

Description of Land, NE of SE, SE of SE Sec. 28, Town 145, R'ge 42. No. 628.

Plffs. Ex. 26.

Application for Additional Allotment.

White Earth, Minn., May 17, 1905.

The undersigned, a Gull Lake Chippewa Indian, No. 233, of John Bad Boy's band, schedule No..... White Earth Agency, hereby makes application, under Steenerson Act of April 28, 1904, (33 Stats. 539), for an additional allotment to Alice Mooers of the following described land: NE of SE and SE of SE, Sec. 28, Town 145, Range 42, containing 80 acres.

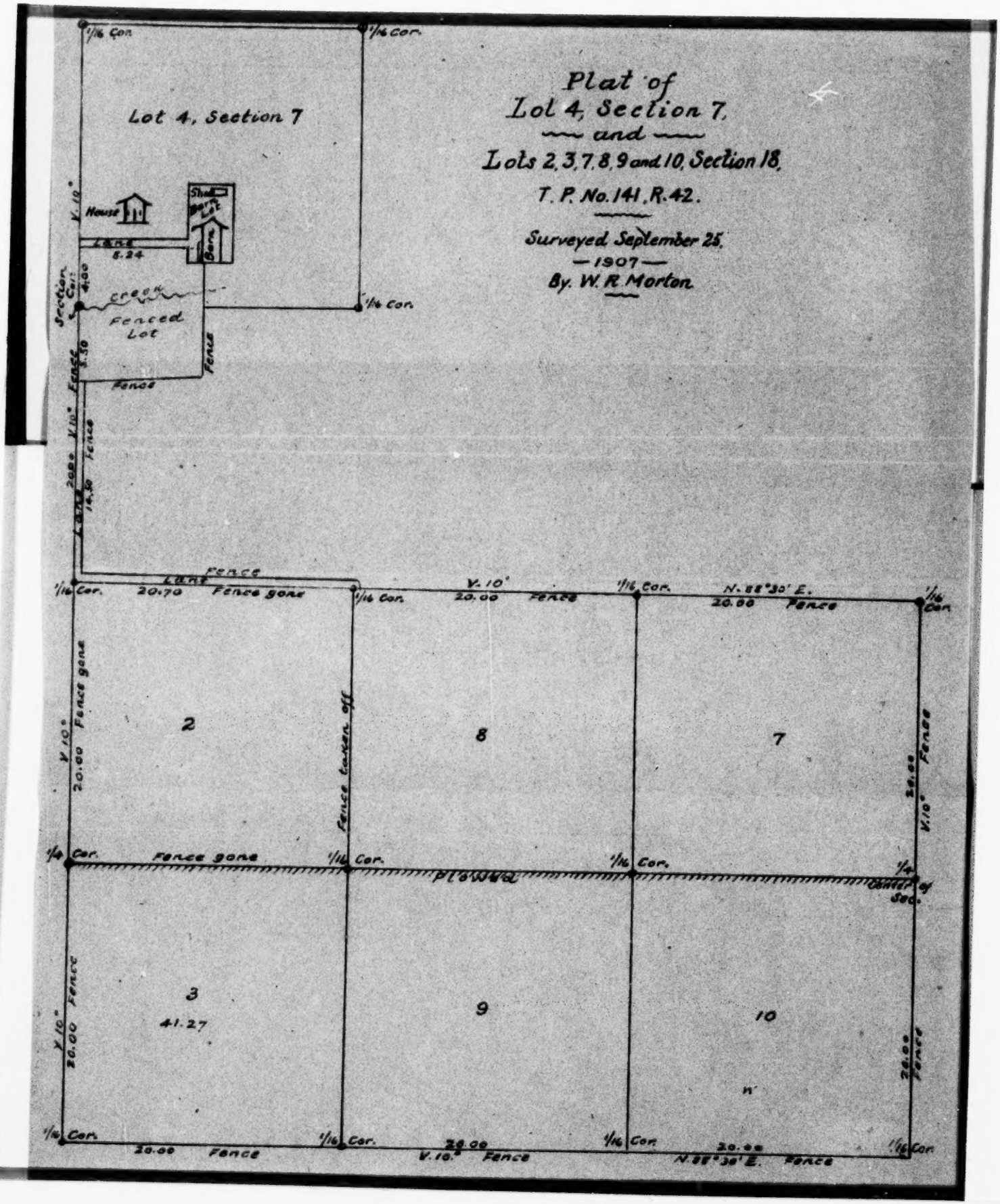
(Signed) ALICE MOOERS, X her mark.

I witness the above signature. The land above described is agricultural and not "pine" land. The above named person resides on the ..... No. 628.

(Attached). Plffs. Ex. 30.

Name: Alice Mooers
Roll No: 233 G. L.
Band: John Bad Boy.
Sch. No:
No: Acres.

NE
SE-SE 28-145-42.


Plat of
Lot 4, Section 7,
and
Lots 2, 3, 7, 8, 9 and 10, Section 18,
T. P. No. 141, R. 42.
Surveyed September 25,
1907
By. W. R. Morton
Lot 4, Section 7
1/16 Cor.
1/16 Cor.
House
Shed
Barn
Lane
8.24
V. 10°
Section Cor.
4.00
Creek
Fenced Lot
1/16 Cor.
3.30
Fence
Fence
V. 10°
Fence
20.82
14.50
Lane
Fence
1/16 Cor.
20.70
Fence gone
1/16 Cor.
V. 10°
20.00
Fence
1/16 Cor.
N. 88° 30' E.
20.00
Fence
1/16 Cor.
2
8
7
V. 10°
20.00
Fence gone
Fence taken off
20.00
Fence
V. 10°
1/4 Cor.
Fence gone
1/16 Cor.
1/16 Cor.
Platted
1/4 Cor. of Sec.
3
41.27
9
10
V. 10°
20.00
Fence
20.00
Fence
1/16 Cor.
20.00
Fence
1/16 Cor.
20.00
V. 10°
Fence
1/16 Cor.
20.00
N. 88° 30' E.
Fence
1/16 Cor.

Plffs. Ex. 28.

208 A. S. 8 W 1. Application for Allotment.

White Earth, Minn., Nov. 5, 1895.

The Undersigned, a Gull Lake Chippewa Indian, No. Supt., of ..... band, in Minnesota, hereby makes application, under Act of January 14, 1889, for an allotment to my minor son Chas. E. Moores of the following described land: NE¼ of NW¼ Sec. 7 and Lot 2 Sec. 18 Sec. 7 & 18 Town 141, Range 42, containing 80 acres. Of this tract no acres were under cultivation.

Signed, SAM E. MOOERS.

I witness the above signature. The land above described is agricultural and not "pine" land. The above named person resides on the Reservation. No. 4739. 141-42.

Signed, G. W. POUSSIN.

(In red ink) and SE of SW, Sec. 6.

(Attached) Charles E. son of Sam. E. Mooers born Oct. 1895, Odin e gun's band. Gull Lake Roll.

(Signed) D. S. MORRISON.

209 Plffs. Ex. 29.

Application for Allotment.

4 S. 8.
M. White Earth, Minn., Oct. 22, 1895.

The undersigned, a Gull Lake Chippewa Indian, No. Suppl., of....band, in Minnesota, hereby makes application, under Act of January 14, 1889, for an allotment to NE of SW & NW of SE (in red ink) Lot 4 and S½ of SW of the following described land: Sam E. Mooers Sec.... 6 ...., Town 141, Range 42, containing.....acres.

Of this tract.....acres were under cultivation. (In red ink) and SW of SE Sec. 7.

Signed, SAM. E. MOOERS.

I witness the above signature. The land above described is agricultural and not "pine" land. The above named person resides on the Reservation.

G. W. POUSSIN.

No. (In red ink) 4656, May 10-97.

210 Plffs. Ex. 32.

(In ink: C. F. H.)

Department of the Interior,
Office of Indian Affairs,

Washington, July, 16, 1907.

I, C. F. Larrabee, Acting Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true copies of the originals as the same appear on file in this office.

In Testimony Whereof, I have hereunto subscribed my name, and caused the seal of this Office to be affixed, on the day and year first above written.

C. F. LARRABEE,
Acting Commissioner.

(Seal: United States of America. Office of Indian Affairs.)

211 Plffs. Ex. 33.

White Earth Agency, Minnesota,
June 15, 1906.

Samuel E. Moores of Lake Park, Minnesota, sworn:

My name is Samuel E. Mooers, 47 years of age, and live at Lake Park, Minnesota, about 6 miles from the reservation line; I am a member of the Chippewa tribe of Indians; I have five children, and three of them have received allotments of 160 acres each; my wife is not a member of the tribe; my daughter, Alice J. age 8 years, and my son Lewis D., age 6, have received no allotments; they are both enrolled as members of the tribe and entitled to 160 acres of land each; another child, now deceased, was allotted 160 acres, which makes 800 acres in all which has been allotted to myself and children; my oldest child is 21 years of age; the others are minors; no timber land has been allotted to me or to either of the four children up to the present time.

Inspector Churchill: Where did you come from at the time you came to White Earth?

Mr. Mooers: I came to White Earth from Fort Ripley, Minnesota, in 1892, and have lived here all the time since, except two winters, up to November, 1905, when I removed to Lake Park for the purpose of getting my children in school; I hired

a house and lot at Lake Park; I rent my house and land, and also the land belonging to my children, and receive one-third of the crop.

Inspector Churchill: How many acres of land have you under cultivation?

Mr. Mooers: About 425 acres.

Inspector Churchill: When did you make selections of land for your daughter Alice J. and your son Lewis D.?

212 Mr. Mooers: In August, 1904, I selected for my daughter Alice J., the E/2 of the NW/4 of section 15, township 142, range 39, and for my son Lewis D., the W/2 of the NW/4 of section 15, township 142, range 39.

Inspector: Who made these allotments to your children?

Mr. Mooers: Joseph E. Perrault, clerk in the Agent's office, gave me the memorandum showing that this land had been alloted to my daughter and son.

Inspector: You supposed then that those tracts had been allotted to your two children?

Mr. Mooers: Yes sir.

Inspector: When did you first find out that this land had not been allotted to them?

Mr. Mooers: Cannot recall exactly the time, but think it was in the latter part of December.

Inspector: Did you receive notice or any letters at that time to the effect that these lands would not be allotted to your children?

Mr. Mooers: Here is one letter that I received, but I am sure I received two letters; this is only one I have been able to find.

Inspector: I notice that this letter is dated February 15, 1905. It reads as follows:

Plffs. Ex. 17.

"I am closing up the allotments of land to Indians who have not yet received their first 80 acres and notice that some of your family have not been allotted. You are therefore requested to call at this office and enter the tracts necessary to complete the allotments to your family, such selections to be made from the vacant agricultural lands on this reservation.

Should you neglect to attend to this matter before April 1, 1905, I will be compelled to complete this allotment myself as provided by the General Allotment Act. and the selections I make will have to be final although they may not prove to be the tracts that you desired."

(Signed) SIMON MICHELET,
U. S. Indian Agent.

This letter which I have read will be made a part of the records. What action did you take upon the receipt of
213 this letter?

Mr. Mooers: I took no action; did not answer it.

Inspector: When did you first talk with the agent on this subject after February 15, 1905?

Mr. Mooers: On the evening of April 24, 1905.

Inspector: Did you not know before the evening of April 24, 1905, that these lands to your children had been cancelled?

Mr. Mooers: No sir.

Inspector: Where did this talk between you and the Agent take place?

Mr. Mooers: I was down town on the street and he came along and got hold of me on the sleeve of my coat, and he and I walked up towards the old warehouse.

Inspector: When you met the Agent, who was the first to mention the subject of these allotments to your children?

Mr. Mooers: The Agent did.

Inspector: What did he say?

Mr. Mooers: On our way up towards the old warehouse he asked me to throw up the claims I had taken for my two children, and I told him I did not see any reason why I should.

Inspector: What did the Agent say then?

Mr. Mooers: He said that I could not hold them.

Inspector: Did he give you any reason why you could not hold them?

Mr. Mooers: No sir.

Inspector: How long did this conversation between you and the Agent last?

Mr. Mooers: About ten minutes.

Inspector: Having been informed by the Agent that your children could not hold the selections made by you, what
214 was your next move in the matter of selecting other lands for them?

Mr. Mooers: I did nothing, but let the matter rest that way.

Inspector: Have you ever done anything since then toward selecting other allotments for them?

Mr. Mooers: I made selections of other 80's, but they were not allotted to them.

Inspector: Why not?

Mr. Mooers: Do not know.

Inspector: Do I understand you to say that you have made two selections of land for these two minor children, and that in each case the lands have been allotted to others?

Mr. Mooers: That is right.

Inspector: Do you mean to say that you do not know why these lands were not allotted to your minor children?

Mr. Mooers: Yes sir, I do not know why.

Inspector: Have you ever been told why?

Mr. Mooers: No sir.

Inspector: Has the Agent ever refused to allot any lands to your children?

Mr. Mooers: Yes sir, on Section 15.

Inspector: Did you get the other lands selected by you for these children?

Mr. Mooers: No sir.

Inspector Did you ever get any lands for them?

Mr. Mooers: Yes sir, 80 acres.

Inspector: Do I understand you to say that 160 acres has been allotted to these children?

Mr. Mooers: Yes sir.

215 Inspector: Do you mean that each child has been allotted 80 acres?

Mr. Mooers: I do not know if the selection I made was given to them but applied for land in Section 27, not very far from the town of Mahnomen.

Inspector: What kind of land is that?

Mr. Mooers: Prairie land.

Inspector: Have you any improvements on these tracts of land?

Mr. Mooers: No sir.

Inspector: Do you expect to get 160 acres more?

Mr. Mooers: Yes sir.

Inspector: You spoke about sending some papers to Mr. Leupp regarding this matter.

Mr. Mooers: Yes sir, the original of the letter which you have just read.

Inspector: Is this all the papers you have sent to Mr. Leupp?

Mr. Mooers: I think so.

Inspector: Have you received any letters from Commissioner Leupp on the subject?

Mr. Mooers: No sir, not personally. Here is a letter from Acting Commissioner Larrabee, dated June 5, 1906, stating that all papers in the contest with Edward L. Warren and B. L. Fairbanks have been placed in your hands.

Inspector: Do you know of any reason why another 160 acre tract which has not already been allotted, should not be allotted to your children upon request to the Agent?

Mr. Mooers: I would not take other tracts until I find out why my children have not been allotted the lands selected for them in Section 15.

Inspector: Do you mean to say that if you did not get the lands first selected by you, that you would refuse to select other tracts?

216 Mr. Mooers: Not until I find out why they were not given the lands first selected for them.

Inspector: Are you sure you have never received any communications on this subject from the Indian Office at Washington?

Mr. Mooers: Yes sir.

Inspector: Where did you live immediately after coming on the reservation in 1892?

Mr. Mooers: I lived in a tent through breaking season.

Inspector: You state that you have lived here since 1892 up to 1905, except two winters when you were off the reservation. Is this correct?

Mr. Mooers: Yes sir, I spent some of the time in the woods, and the balance of the time was spent on my farm.

Inspector: Is this farm, which you speak of, your allotment or the allotment of some member of your family?

Mr. Mooers: My own allotment.

Inspector: Did you break and occupy any other lands on the reservation?

Mr. Mooers: No sir.

Inspector: Did you ever make application to the Chippewa Commission to have particular lands reserved for yourself, or members of your family?

Mr. Mooers: No sir.

Inspector: Who made the original allotments to yourself and your four children?

Mr. Mooers: The Chippewa Commission.

Inspector: Are you sure you never occupied other lands on the reservation?

Mr. Mooers: I did put in some old land belonging to Robert Fairbanks for one season, and gave him one-fourth of the crop for his share.

217 Inspector: Are the lands that have been allotted to yourself and members of your family, all in one body?

Mr. Mooers: No sir; they are in four different pieces.

Inspector: You say you have no pine lands?

Mr. Mooers: No sir.

Inspector: Any timber lands of any kind?

Mr. Mooers: No sir.

Inspector: Were you at the agency immediately following the allotting under the so-called Steenerson Act, 1905, and known as the additional allotments?

Mr. Mooers: Yes sir.

Inspector: You were notified that the original selections made by you in Section 15, township 142, had been cancelled?

Mr. Mooers: Yes sir.

Inspector: And that these lands had been made vacant?

Mr. Mooers: Yes sir.

Inspector: When did this conversation with the Agent take place, and at what place?

Mr. Mooers: It was in the evening after the first day's allotting, and near the old warehouse.

Inspector: Do you mean to say that this was the first intimation that you had to the effect that the original selections made by you were cancelled, and allotted to others?

Mr. Mooers: No sir, I received a letter from the Agent telling me that the original selections had been cancelled.

Inspector: Knowing that these lands had been cancelled, why did you not again apply for them during the allotting?

Mr. Mooers: I looked at the plats and found that these lands had been taken up by others.

218 Inspector: Did you apply for other timber lands that were similar to those lands first selected by you?

Mr. Mooers: Yes sir, several of them.

Inspector: Why were they not allotted to your children?

Mr. Mooers: They had been taken up by others, but did secure two eighty tracts for them.

Inspector: Then you do know that each of your two children have been allotted 80 acres of land?

Mr. Mooers: Yes sir:

Inspector: When were they allotted these lands?

Mr. Mooers: I was in line during the allotting and it was when I went through the first time.

Inspector: Did you go around the second time to get timber lands for your children?

Mr. Mooers: Yes, and it was the second time I went through that I got the second eighty, as I was allowed to select but one eighty at a time, and I had two children to take land for.

Inspector: Have you seen all of the 800 acres of land that is now held by yourself and members of your family?

Mr. Mooers: I have seen all of it, except 40 acres, which I have only driven over without following the lines.

219 Defts. Ex. E.

Department of the Interior, Washington. C.J.G.

1429—1907.

Alice J. Mooers
and
Lewis D. Mooers
v.
Edward L. Warren
and
Annie Fairbanks.

The Commissioner of Indian Affairs,

Sir:

An appeal has been filed by Samuel E. Mooers, on behalf of his minor children Alice J. and Lewis D. Mooers, from the decision of your office of July 13, 1906, in the controversy between said minor children and Edward L. Warren and B. L. Fairbanks, the latter on behalf of his minor child Annie Fairbanks, involving the E½ and the W½ of the NW¼ of Sec. 15, T. 142 N., R. 38 W., White Earth Reservation, Minnesota.

All parties to this controversy are Chippewa Indians entitled to take allotments of one hundred and sixty acres each on the White Earth Reservation, provision for which was originally made in the act of January 14, 1889 (25 Stat., 642). It was provided in the act of April 28, 1904 (33 Stat., 539), known as the Steenerson act:

That where any allotment of less than one hundred and sixty acres has heretofore been made, the allottee shall be allowed to take an additional allotment, which, together with the land already allotted, shall not exceed one hundred and sixty acres.

Additional allotments under the latter act were not commenced to be made until April 24, 1905, and all the Indians of the reservation were notified accordingly. Prior to that date no applications for allotment under said act were received, but
220 original allotments under the act of January 14, 1889, supra continued to be made.

It appears that on June 29, 1904, B. L. Fairbanks applied to the Indian agent at White Earth agency to have allotted to his daughter, Annie Fairbanks, the W½ of the NW¼ of Sec. 15, T. 142 N., R. 39 W., and on June 30, 1904, Edward L. Warren applied to have allotted to himself the E½ of said NW¼. Both of these applications were made under the Steenerson act, but were denied because applications under said act were not at the time being received. August 8, 1904, Samuel E. Mooers applied to have allotted to his minor daughter, Alice J. Mooers,

the E½ of the NW¼ of Sec. 15, T. 142 N., R. 39 W., and to his minor son, Lewis D. Mooers, the W½ of said NW¼. These applications were for original allotments under the act of January 14, 1889, and were allowed by the land clerk in the Indian agent's office. Later, in the month of August, 1904, the agent directed the clerk to cancel said allotments, on the ground that the land embraced therein was "pine land", and that no pine land would be allotted to applicants for original allotments under the act of 1889. It is not clear just when Mooers first received knowledge of such cancellation. He did receive a letter dated February 15, 1905, from the Indian agent, in which he was requested to complete the allotments due his family, be being informed that "the allotments of land to Indians who have not yet received their first 80 acres" were being closed up. Mooers appears to have taken no action in the matter prior to April 24, 1905, the date for making additional allotments under the Steenerson act.

On the last mentioned date B. L. Fairbanks and Edward L. Warren presented themselves in line and the former was allowed to select the W½ of the NW¼ of Sec. 15, T. 142 N., R. 39 W., for his daughter Annie as an additional allotment under the Steenerson act, and the latter the E½ of said NW¼ under said act. Protest was subsequently made by Samuel E. Mooers against the cancellation of the original allotments of said tracts made to his minor children, and against their allotment to Fairbanks and Warren, February 20, 1906, your office called upon the Indian agent for a report in the premises. In his report, which was made March 23, 1906, the agent stated that he had been informed Mooers had fenced and partly cultivated several tracts which he intended to have allotted to some of his children; that he felt Mooers ought to take these tracts as original allotments and had repeatedly urged him to do so; and that he ordered the allotments made to Mooer's children August 8, 1904, cancelled, because they were for pine lands.

221

March 31, 1906, your office stated to the agent:

It is true that in the early work of the Chippewa Commission in making allotments on the White Earth Reservation the Office did direct that only agricultural lands should be allotted, reserving the pine lands for the common benefit of all of the Indians of the reservation; but after the passage of the Steenerson act which contemplated the allotment of all the lands of the reservation, such instructions necessarily could have no application.

In said letter your Office, "believing that the original allotments were made in good faith and that the allottees acquired equitable rights thereunder," directed the agent to again allot

to the children of Mooers the lands originally allotted to them, namely, to Alice the E½ of the NW¼ of sec. 15, T. 142 N., R. 39 W., and to Lewis the W½ of the NW¼ of said section. The agent did not carry out the directions of your office but on the contrary under date of April 7, 1906, advised your office that he had been requested by Fairbanks and Warren to defer cancellation until they should communicate with your office relative to a request to be further heard in the premises.

The matter was placed in charge of an Indian inspector for investigation and report. Such investigation was had and a report made in June, 1906, as a result of which your office in the decision now complained of and based on said report, held
222 that the additional allotments of Annie Fairbanks and Edward L. Warren for the tracts in question should stand as made, the Indian agent being instructed to disregard your office letter of March 31, 1906, which directed that the Mooers children be re-allotted said tracts.

The inspector in his report favorable to Fairbanks and Warren took no notice whatever of the fact that the allotments made to the Mooers children August 8, 1904, were original allotments under the act of 1889, but he treated them as having been applicants on that date for additional allotments under the Steenerson act. This may have been due to the statement of the Indian Agent in his testimony that he told Mooers "that I could not reserve any lands for any one, and that he would have to take his chances the same as the other Indians entitled to allotment." This undoubtedly referred to the plan of making additional allotments under the Steenerson act, although the Indian agent subsequently testified that the reason for his telling Mooers he could not have the lands allotted to his children August 8, 1904, was that they were pine lands.

It is plain that Fairbanks and Warren gained no preference right by reason of their applications offered June 29, and 30, 1904, the same being for additional allotments under the Steenerson act, and presented prior to the time designated and advertised for making such allotments. Whereas the applications of the Mooers children were for original allotments, were actually allowed, and there was no valid reason against such action. It is also plain that there was no reason for laying upon Mooers the rule governing additional allotments under the Steenerson act, and there was no occasion for his appearing in line taking "chances the same as the other Indians entitled to allotment" under said act.

The decision of your office is reversed, the tracts in
223 question will be reallotted to Alice J. and Lewis D. Mooers, and the allotments of Edward L. Warren and

Annie Fairbanks for said tracts canceled. It appears that allotments have been made to the Mooers children for which Samuel E. Mooers says he did not apply. Your office will also adjust this matter accordingly.

The papers are herewith.

Very respectfully,

(Signed) J. R. GARFIELD, Sec.

(Stamped on front page, Date, May 13, 1907).
(Stamped on back, 46254 Indian Office, May 14, 1907, Incl. No. 1)."

224 Pltffs. Ex. 34.

Refer in reply to the following:

Land 76249-1905

Department of the Interior, Office of Indian Affairs,

Washington, November 8, 1905.

The U. S. Indian Agent, White Earth Agency, Minn.

Sir:

The Office is in receipt of your letter of September 20, 1905, replying to Office letter of May 26, 1905, transmitting a communication from Gus. H. Beaulieu, relative to the application of Joseph Woodbury, or Hole in the day, for an allotment on the White Earth Reservation, under the provisions of the "Steenerson Act." Mr. Beaulieu states that last year Joseph Woodbury, or Hole in the day, who had been employed at the Pine Ridge Agency, in South Dakota, returned to the White Earth Reservation suffering from tuberculosis, which resulted in his death during the month of September, 1904; that prior to his death and on the 20th day of August, 1904, he made application to you for an allotment under the "Steenerson Act," which application would doubtless be found on file at your Agency.

You report that Mr. Beaulieu's statements are correct, except that the land applied for is described as Lots 1 and 2, of Section 19, Twp. 143, R. 30. You enclose the application, the same having been dated August 20, 1904, and duly witnessed by Gus. H. Beaulieu and Edith M. Woodbury. You state that at the time the application was made you had no authority to make the additional allotments under the so-called "Steenerson Act," and so informed all persons who had made application for allotments up to that time.

225 In reply, you are instructed that under the rulings of this Department in such cases, said applicant is entitled to an additional allotment under the so-called "Steenerson

Act". Your former instructions of June 14, 1904, are accordingly so far modified as to permit you to make an allotment to this applicant under the provisions of said Act. On the schedule of allotments, in the column of remarks, you should refer to this letter as your authority for making the allotment.

If any similar cases arise, the facts should be fully reported to this Office before rendering a decision thereon. The application is returned for file in your Office.

Very respectfully,
C. F. LARRABEE,
Acting Commissioner.

McP—HJS.

I hereby certify that the foregoing letter is a true and correct copy of a letter received by me from the Indian Office, dated November 8, 1905, and the original of said letter appears on file in this office.

In testimony whereof I have hereunto subscribed my name on this first day of November, 1907.

(Signed) SIMON MICHELET,
Supt. & Spl. Disb. Agent.

White Earth, Minnesota.

226 United States of America,
District of Minnesota—ss.
Sixth Division.

I, George B. Hillman, Examiner, hereby certify that the foregoing testimony in the above entitled causes was taken before me at the times and places in record thereof indicated; that before testifying, each of the several witnesses was by me severally duly sworn to tell the truth, the whole truth and nothing but the truth; that said testimony was taken in shorthand, and by consent of parties the signature of the respective witnesses to their extended depositions was waived.

GEO. B. HILLMAN,
Special Examiner.

227 United States Circuit Court, District of Minnesota, Sixth Division.

I, Henry D. Lang, Clerk of the United States Circuit Court for the District of Minnesota, do hereby certify that I have carefully compared each of the copies attached to this certificate with its respective original, which is in my custody as such Clerk; that each of the said copies is a full, true and correct transcript from such original and of the whole thereof; and that the foregoing and attached record, consisting of pages

1 to 226, is complete Trial Record of the cases therein named, prepared by the Clerk pursuant to Rule XXVI of this Court.

Witness my hand as such Clerk and the Seal of said Court. Done at my office in the City of Fergus Falls, in said District, this 4th. day of January, A. D. 1908.

Seal,
U. S. Circuit Court,
Sixth Division,
Dist. of Minnesota.

HENRY D. LANG. Clerk,
By L. A. Levorsen, Deputy.

228 Chancery Rule and Order Book, P. 224.

Jany. 21, 1908.

United States Circuit Court, District of Minnesota, Sixth Division.

Annie Fairbanks, by her guardian ad litem, Benjamin L. Fairbanks, Complainant,

vs.

The United States of America, Defendant.

Order Setting Case for hearing.

The testimony of the respective parties in the above entitled cause having been taken and filed and the trial record prepared and filed as required by the Rules of this Court, it is—

Ordered—That this cause be and the same hereby is set for trial at Duluth, Minnesota, February 10th, 1908, at 10 o'clock A. M.

HENRY D. LANG, Clerk.
By L. A. Levorsen, Deputy.

Chancery Rule and Order Book, P. 225.

Jany 21, 1908.

United States Circuit Court, District of Minnesota, Sixth Division.

Edward L. Warren, Complainant,

vs.

The United States of America, Defendant.

Order Setting Case for hearing.

The testimony of the respective parties in the above entitled cause having been taken and filed and the trial record prepared and filed as required by the Rules of this Court, it is

Ordered—That this cause be and the same hereby is set for trial at Duluth, Minnesota, February 10th, 1908, at 10 o'clock A. M.

HENRY D. LANF, Clerk.
By L. A. Levorsen, Deputy.

229 And to-wit: February 10th, 1908, the cases were brought on for a trial, the record of which according to the Term Minutes in the Fifth Division is in the words and figures following, to-wit:

230 United States Circuit Court, District of Minnesota,
Fifth Division.

Term Minutes January Term A. D. 1908. February 10, 1908.

Monday Morning, ten o'clock.

Court opened pursuant to adjournment.

Present: Hon. Page Morris, Judge, Henry D. Lang, Clerk; By Thos. H. Pressnell, Deputy.

Edward L. Warren, Complainant,
No. 181. vs. In Equity.
The United States of America, Defendant.

Sixth Division Case.

This day come the parties to this cause, by their respective solicitors, Mr. George B. Edgerton apeparing on behalf of the Complainant and Mr. Chas. C. Houpt, United States Attorney, appearing on behalf of the defendant, and the same now comes on for final hearing in equity upon the pleadings, proofs, exhibits and records for hearing in equity; whereupon George B. Edgerton, Esq., opens, states and argues the cause to the Court on behalf of the complainant and Chas. C. Houpt, Esq., opens, states and argues the cause to the Court on behalf of the defendant; and after hearing the arguments and statements of the solicitors for the respective parties hereto, the said cause is duly submitted to and by the Court taken under advisement.

231 United States Circuit Court, District of Minnesota,
Fifth Division.

Term Minutes January Term A. D. 1908. February 10, 1908.

Monday Morning, ten o'clock.

Court opened pursuant to adjournment.

Present: Hon. Page Morris, Judge, Henry D. Lang, Clerk, By Thos. H. Pressnell, Deputy.

Annie Fairbanks, a minor, by her guardian ad litem Benjamin Fairbanks, Complainants,
No. 180. vs. In Equity.
The United States of America, Defendant.

Sixth Division Case.

This day come the parties to this cause, by their respective solicitors, Mr. George B. Edgerton appearing on behalf of the complainant and Mr. Chas. C. Houpt, United States Attorney, appearing on behalf of the defendant, and the same now comes on for final hearing in Equity upon the pleadings, proofs, exhibits and records for hearing in Equity; whereupon George B. Edgerton, Esq., opens, states and argues the cause to the Court on behalf of the complainant and Chas. C. Houpt, Esq., opens, states and argues the cause to the Court on behalf of the defendant; and after hearing the arguments and statements of the solicitors for the respective parties hereto, the said cause is duly submitted to, and by the Court taken under advisement.

232 And thereafter, to-wit: on February 28th, 1908, the opinion and decision of the Court was filed herein, which is in the words and figures following, to-wit:

233 Memorandum filed with Decrees entered on the 27th day of February, 1908, in the following cases:

United States Circuit Court, District of Minnesota, Sixth Division.

Edward L. Warren, Plaintiff,
vs.
United States of America, Defendant.
and In Equity.
Annie Fairbanks, a minor, by her guardian ad litem, Benjamin L. Fairbanks, Plaintiff,
vs.
United States of America, Defendant.

The Act of January 14, 1889, provided that the allotments provided for therein should be made in conformity with the Act of February 8, 1887. It is evident from the age of these two minor children of Samuel E. Mooers that they were not entitled to any allotments on the White Earth reservation under that act. The agent, Mr. Michelet, in his letter of February 15, 1905, (see record p. 84) indicates that these minor children were entitled to allotments of eighty acres each under the Act of 1889. I do not understand how they were so entitled unless they be-

came so by the Act of February 28, 1891, amending the
234 Act of February 8, 1887, which provides, in its first section, as follows:

"That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty, stipulation or by virtue of an act of congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural or grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed, if necessary, and to allot to each Indian located thereon one-eighth of a section of land."

But there is a proviso, in the first section of this amending act, as follows:

"Provided, further; that where existing agreements or laws provide for allotments in accordance with the provisions of said act of February 8, 1887, or in quantities substantially as therein provided, allotments may be made in quantity as specified in this act, with consent of the Indians, expressed in such manner as the President in his discretion may require."

There is nothing in the record, or elsewhere, which has been called to my attention, to show that the Indians who agreed to the Act of 1889 have given such consent. So that, it seems to me, these children were not entitled to any allotments under the Act of 1889, and their only right to allotments was created by the so-called Steenerson Act of April 28, 1904.

But if they were entitled to allotments under the Act of 1889 they could, under the construction placed upon that Act by the Interior Department, only receive such allotments, prior to the passage of the Steenerson Act, from the vacant agricultural lands on the reservation. Their right, therefore, to have the lands here in controversy, the same being pine lands, allotted to
them, did not exist until the passage of the Steenerson
235 Act, even if they were entitled to allotments under the Act of 1889.

The Secretary of the Interior seems to have taken this view, by quoting with approval from the letter of the Commissioner of Indian Affairs, wherein he says, "But after the passage of the Steenerson Act which contemplated the allotment of all the lands of the reservation, such instructions (referring to the instructions to allot only agricultural lands) necessarily could have no application."

So that, from whatever point we may view the matter, without invoking the rule of law referred to in the brief of the attorney for the plaintiffs, these minor children had no right to have these particular lands allotted to them under the Act of 1889, and their only right to such allotments arose by virtue of the Steenerson Act.

But, under the said Steenerson Act, these plaintiffs had the same right to additional allotments that these minor children had to original allotments. That being the case, if the agent had a right to reject the applications of the plaintiffs, and to make them take their "chances the same as other Indians entitled to allotments" on the date fixed for the Steenerson law to go into effect, he also had the right to reject the applications made by Samuel E. Mooers for his minor children, and to make him take chances the same as other Indians entitled to allotments upon that date. This is just what he did when he discovered that the clerk had assumed to allot them these lands.

On the date fixed for the going into effect of the Steenerson law, the plaintiffs appeared, and, in accordance with the
236 rules prescribed by the agent, they were allotted these lands by the agent under their right to additional allotments, and if the Interior Department had the power to fix a date for the going into effect of that law, and if all these parties were entitled to allotments or additional allotments only under that law, their rights must be determined by what took place on the date fixed. I am unable to see how the application made by Samuel E. Mooers for his minor children, on August 8, 1904, could give to those children any equity superior to the equities of these plaintiffs, for if the making of an application for an allotment prior to the date fixed for the Steenerson Act to go into effect could create any equity in favor of the applicant, the plaintiffs here have the prior equity under their applications made June 29th and 30th.

These positions are most clearly expressed in the brief of the attorney for the defendant, from which I quote as follows: "It is a matter of common knowledge that where land is subject to appropriation under some form of congressional legislation, the courts have uniformily declared that the first applicant in time to acquire such land is the first in right. This is a principle that has descended to us from the earliest conception of the idea of private property, and is applicable alike to the public domain and tribal Indian lands".

"Both classes of lands are in a sense communal until segregated by individual claimants. The first qualified claim-

ant having the same right as any other qualified claimant is natually and logically preferred to the later claimant. Hence inevitably results the rule that when something may be
237 had for the asking, the earliest to seek is the first to find. Adopting this manifest and just rule as controlling the dispute involved, we have only to inquire which of the claimants make the first legal application for the allotments in question".

"In giving effect to the principle of priority, we must remember that before it may become the basis on which to establish superior equities, the land to be acquired must be susceptible to immediate appropriation. The testimony shows that the plaintiffs were first to attempt to get the land. Their applications were not received nor considered because the Steenerson Law was not then operative on the reservation, and the plaintiffs were so informed. They acquiesced in the rejection of their applications by the agent, and on the appointed day for beginning allotments, they then tendered their applications".

"That the Interior Department had the power to fix a definite date when the Steenerson Law should actually go into effect, I have no doubt. It was a regulation essential to the due administration of the trust imposed upon the President. The Act itself provides that in case there was not sufficient land to allot each Indian one hundred and sixty acres, then it was to be pro rated. This condition, created by the statute, made it imperative that the authorities should first ascertain the number of Indians who were entitled to a participation in the land. * * * * * It has also been the general practice in opening up public lands for settlement to make announcement of the date when filings will be received and entries made. The agent was only pursuing a practice adopted in the spirit of fairness to all and most likely to avoid suspicion of favoritism and fraud".

237½ It seems to me clear that the agent was right, not only in rejecting the applications of the plaintiffs, but also in annulling the allotments which his clerk had assumed to make to the minor children of Samuel E. Mooers, as soon as he discovered that he had assumed to make such allotments; and that he was clearly right in making all parties who desired allotments or additional allotments under the Steenerson Act to appear in line, and take their chances the same as other Indians entitled to allotments.

It seems clear from the evidence that he notified Mooers of the annulment of the so-called allotments to his children, and

informed him that he should take his chances the same as other Indians entitled to allotments. This being the case, Mooers had the same chance, on the date fixed for the going into effect of the Steenerson Act, that the plaintiffs had, and the plaintiffs having fairly secured allotments of these lands on that date, in the manner prescribed by the agent, have, to my mind, a clear right to them.

The foregoing considerations make it unnecessary to consider the other questions presented by the brief of the plaintiff's attorney.

PAGE MORRIS, Judge.

238 And thereafter, at the May, 1908, Term, to-wit: [om] May 5th, 1908, a Decree was entered in favor of the Complainant, which said decree and the entry thereof is in the words and figures following, to-wit:

239 United States Circuit Court, District of Minnesota, Sixth Division.

Term Minutes, May Term, A. D. 1908.

May 5th, 1908.

Pleas before the Honorable the Circuit Court of the United States of America for the District of Minnesota, in and for the Sixth Division of said District, begun and held pursuant to the Act of Congress, at the City of Fergus Falls, in said District, on the First Tuesday in May, being the 5th. day of May in the year of our Lord one thousand nine hundred and eight and of our Independence the one hundred and thirty second year.

Court was duly opened and Proclamation made.

Present:
Honorable Page Morris, Judge,
Charles C. Houpt, U. S. District Attorney,
William H. Grimshaw, U. S. Marshal,
Henry D. Lang, Clerk.

* * * * * * *

United States Circuit Court, District of Minnesota, Sixth Division.

Annie Fairbanks, a minor, by her Guardian ad litem, Benjamin L. Fairbanks, Plaintiff,
(No. 180) vs. In Equity.
United States of America, Defendant.

The above entitled case came on to be heard at Duluth, in said District, at 10 o'clock A. M. on the 10th. day of February,

A. D. 1908, upon the pleadings and proofs, and was argued by counsel;

George B. Edgerton, Esquire, appearing on behalf of the plaintiff; and Chas. C. Houpt, Esquire, appearing on behalf of the defendant.

The court having duly considered the pleadings and proofs and the arguments of counsel, and being fully advised in the premises, doth

Adjudge, Order and Decree that the plaintiff is entitled to select and have allotted to her the west half of the northwest quarter of section fifteen, in township one hundred and forty-two north, range thirty-nine west, by her selected within the limits of the White Earth Indian Reservation, in the state of Minnesota, the same being the land described in the complaint herein, and to have said premises patented to her as provided in the acts of congress of January 14, 1889, and of April 24, 1904, providing for additional allotments for the Chippewa Indians on the White Earth Indian Reservation aforesaid.

Let judgment be entered accordingly.

By the Court:

PAGE MORRIS, Judge.

Dated this 27th. day of February, A. D. 1908.

240 And thereafter, towit: July 23rd. 1908, the defendant filed its petition for an appeal to the United States Circuit Court of Appeals and an order thereto attached allowing said appeal, which said petition and order are in the words and figures following, to-wit:

241 In the Circuit Court of the United States, District of Minnesota, Sixth Division.

Annie Fairbanks, a minor, by her Guardian ad litem Benjamin Fairbanks, Complainant,
(No. 180) vs.
The United States of America, Defendant.

Petition and Order.

The above named defendant in the above entitled cause, conceiving itself aggrieved by the final decree made and entered by the above named court in said cause under date of May 5, 1908, wherein and whereby it was and is adjudged and decreed that the complainant is entitled to select and have allotted to her the West Half of the Northwest quarter (W½-NW¼) of Section 15, in Township 142 North, Range 39 West,

by her selected within the limits of the White Earth Indian Reservation in the State of Minnesota, the same being the land described in the complaint herein, and to have said premises patented to her, as provided in the Acts of Congress of January 14, 1889 and April 28, 1904, providing for additional allotments to Chippewa Indians on the White Earth Indian Reservation aforesaid, does hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit from said decree and from the whole thereof, for the reasons set forth in the assignment of errors, which is filed herewith, and the said defendant prays that this, its petition for said appeal, may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

Dated July 23rd, 1908.

CHARLES C. HOUPT,
United States Attorney and
Solicitor for Defendant.

The foregoing petition on appeal is granted, and the claim of appeal therein made is allowed.

It Is Further Ordered, that a certified transcript of the record, testimony, exhibits and all proceedings herein be transmitted to the United States Circuit Court of Appeals for the Eighth Circuit within Sixty Days from the date hereof.

It Is Further Ordered, that this appeal act as supersedeas in said cause.

Dated July 23rd, 1908.

PAGE MORRIS Judge.

242 And on the same day, to-wit: July 23rd, 1908, the defendant filed its Assignments of Error and Prayer for Reversal of the Decree, which is in the words and figures following, to-wit:

243 In the Circuit Court of the United States, District of Minnesota, Sixth Division.

Annie Fairbanks, a minor by her Guardian ad litem, Benjamin Fairbanks, Complainant,

vs.

The United States of America, Defendant.

Assignment of Errors.

Comes now the defendant in the above entitled cause and files the following assignments of error upon which it will rely on

its appeal from the decree made by this Honorable Court on the 5th. day of May, 1908, in said cause:

I.

In finding and deciding that the Complainant was entitled to select as and for her allotment the land described in the complaint in said cause, and entering a final decree therein and adjudging and decreeing that she is entitled to patent therefor.

II.

In not making and rendering a decree in favor of the defendant and against the complainant, adjudging and decreeing that said land had been legally allotted and appropriated, and was not subject to allotment for or in behalf of said complainant.

III.

In holding and deciding that the two Mooers children, Lewis and Alice, were not entitled to allotments on the White Earth Indian Reservation under the Act of January 14, 1889, and that their only right to allotments was created by the Steenerson" Act of April 28, 1904.

IV.

In holding and deciding that until the Act of April 28,
244 1904, said Mooers children were only entitled to allotments of agricultural land.

V.

In holding and deciding that under the "Steenerson" Act, the complainant had the same right to additional allotments as said Mooers children to original allotments, and that if the agent had the right to reject complainants' application, he had the right to reject the applications of Samuel E. Mooers made on behalf of said minor children.

Wherefore, said defendant prays that the decree of the said Circuit Court of the United States, District of Minnesota, Sixth Division, be in all things reversed.

Dated July 23rd. 1908.

CHAS. C. HOUPT,
United States Attorney and Solicitor for Defendant.

244½ And on the same day, to-wit: July 23rd. 1908, a Citation with admission of service thereon by the complainant was filed, which said original citation and admission of service thereof is hereto attached and made a part of this return, viz:

245 In the Circuit Court of the United States, District of Minnesota, Sixth Division.

Annie Fairbanks, a Minor, by her Guardian ad litem Benjamin Fairbanks, Complainant,

vs.

The United States of America, Defendant.

Citation.

The President of the United States to Annie Fairbanks, a Minor, Benjamin Fairbanks, her Guardian ad litem, and to George B. Edgerton, Solicitor for said Complainant, —Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an order allowing an appeal entered in the Clerk's office of the Circuit Court of the United States for the District of Minnesota, Sixth Division, in that certain action numbered 180, in which Annie Fairbanks, by her Guardian ad litem Benjamin Fairbanks, is complainant and appellee, and the United States is defendant and appellant, to show cause, if any there be, why the decree rendered against the said defendant and appellant as in the said order allowing said appeal mentioned should not be corrected and reversed and why speedy justice should not be done to the defendant in that behalf.

Witness the Honorable Page Morris, District Judge presiding at said Circuit Court at Duluth, Minnesota, this 23rd day of July, 1908.

PAGE MORRIS, Judge.

No. 180. United States of America, District of Minnesota. Circuit Court, Sixth Division. Annie Fairbanks, etc. vs. United States of America, Defendant. Citation. Due and personal service of the within admitted at St. Paul, July 23, 1908. George B. Edgerton, Solicitor for Complt. Filed July 23d, 1908. Henry D. Lang, Clerk. By L. A. Levorsen, Deputy.

246 And thereafter, to-wit: August 15th 1908, a stipulation was filed herein consolidating two cases for the purpose of this appeal, which is in the words and figures following, to-wit:

247 In the United States Circuit Court, District of Minnesota, Sixth Division.

Annie Fairbanks, a minor, by her guardian ad litem Benjamin L. Fairbanks, Plaintiff,

(180.) vs.

The United States of America, Defendant,

and

Edward L. Warren, Plaintiff,

vs.

The United States of America, Defendant

Stipulation.

It is Hereby Stipulated and Agreed by and between the parties to the above entitled action, by their respective Solicitors, as follows:

That the above named causes were tried together: the same testimony being applicable to both cases was made the basis of decision in each case: that said causes having been appealed by the defendant to the Circuit Court of Appeals, Eighth Circuit, the Clerk of the United States Circuit Court is requested to return the testimony in the Annie Fairbanks case only to the end that duplication may be obviated, and that the record on appeal in said Annie Fairbanks case may be referred to and considered as a part of the above named Warren case to the same extent and as fully as it the testimony was embraced therein. The purpose of this stipulation being the avoidance of unnecessary expense of returning and printing the entire record in both cases.

That this stipulation may be filed and made a part of the record in each case.

Dated this 12th. day of August, 1908.

GEORGE B. EDGERTON,
Solicitor for Annie Fairbanks and Edward L. Warren, Plaintiffs.

CHAS. C. HOUPT,
United States Attorney, and Solicitor for Defendant.

Filed Aug. 15, 1908.

248 And thereafter, to-wit: September 2, 1908, an order was filed and entered consolidating the two cases for the purpose of this appeal, which said order is in the words and figures following, to-wit:

249 United States Circuit Court, District of Minnesota, Sixth Division.

Annie Fairbanks, a minor, by her guardian ad litem Benjamin L. Fairbanks, Plaintiff,
(No.180) vs
United States of America, Defendant,

Edward L. Warren, Plaintiff,
(No. 181) vs.
United States of America, Defendant.

Whereas, it appears from the stipulation to that effect duly filed herein on the 15th. day of August, 1908, that the above entitled causes were tried together; that the same testimony was applicable to both of said causes and was made the basis of the decision in each cause, and that the said causes have been appealed by the Defendant to the United States Circuit Court of Appeals for the Eighth Circuit.

Now Therefore, in accordance with the terms and provisions of the said stipulation, it is by the Court—

Ordered: That the Clerk of this Court in making his transcripts and returns upon said appeals shall include therein only the testimony in the Annie Fairbanks case and that the transcript and record on appeal in the said Fairbanks case may be referred to and considered as a part of the above named Warren case to the same extent and as fully as if the testimony was embraced therein.

Sept. 1st. 1908.

PAGE MORRIS, Judge.

250 And thereafter, at the May, 1908 Term, to-wit: [om] May 5th. 1908, a Decree was entered in favor of the Complainant, which said decree and the entry thereof is in the words and figures following, to-wit:

251 United States Circuit Court, District of Minnesota, Sixth Division.

Term Minutes, May Term, A. D. 1908. May 5th, 1908.

Pleas before the Honorable the Circuit Court of the United States of America for the District of Minnesota, in and for the Sixth Division of said District, begun and held pursuant to the act of Congress, at the City of Fergus Falls, in said District, on the First Tuesday in May, being the 5th day of May in the year of our Lord one thousand nine hundred and eight and of our Independence the one hundred and thirty second year.

Court was duly Opened and Proclamation made.

Present:
Honorable Page Morris, Judge,
Charles C. Houpt, U. S. District Attorney,
William H. Grimshaw, U. S. Marshal,
Henry D. Lang, Clerk.

* * * * * * *

United States Circuit Court, District of Minnesota, Sixth Division.

Edward L. Warren, Plaintiff,
(No. 181) vs. In Equity.
United States of America, Defendant.

The above entitled case came on to be heard at Duluth, in said district, on the 10th day of February, A. D. 1908, at the hour of ten o'clock thereof, upon the pleadings and proofs, and was argued by counsel.

George B. Edgerton, Esquire, appearing on behalf of the plaintiff; and Chas. C. Houpt, Esquire, appearing on behalf of the defendant.

The court having duly considered the pleadings and proofs and the arguments of counsel, and being fully advised in the premises, doth

Adjudge, Order and Decree that the plaintiff is entitled to select and have allotted to him the east half of the northwest quarter of section fifteen, in township one hundred forty-two north, range thirty-nine west, by him selected within the limits of the White Earth Indian Reservation, in the State of Minnesota, the same being the land described in [th] the complaint herein, and to have said premises patented to him as provided in the acts of congress of January 14, 1889, and of April 24, 1904, providing for additional allotments for the Chippewa Indians on the White Earth Indian Reservation aforesaid.

Let judgment be entered accordingly.

By the Court:

PAGE MORRIS, Judge.

Dated this 27th day of February, A. D. 1908.

252 And thereafter, to-wit: July 28th, 1908, the defendant filed its petition for an appeal to the United States Circuit Court of Appeals and an order thereto attached allowing

said appeal, which said petition and order are in the words and figures following, to-wit:

253 In the Circuit Court of the United States, District of Minnesota, Sixth Division.

Edward L. Warren, Complainant,
No. 181. vs.
The United States of America, Defendant.

Petition and Order.

The above named defendant in the above entitled cause, conceiving itself aggrieved by the final decree made and entered by the above named court in said cause under date of May 5, 1908, wherein and whereby it was and is adjudged and decreed that the complainant is entitled to select and have allotted to him the East half of the Northwest quarter of Section Fifteen (15), in Township One hundred and forty-two (142), Range thirty-nine (39), by him selected within the limits of the White Earth Indian Reservation in the State of Minnesota, the same being the land described in the complaint herein, and to have said premises patented to him, as provided in the Acts of Congress of January 14, 1889, and April 28, 1904, providing for additional allotments to Chippewa Indians on the White Earth Indian Reservation aforesaid, does hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit from said decree and from the whole thereof, for the reasons set forth in the assignment of errors, which is filed herewith, and the said defendant prays that this, its petition for said appeal, may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

Dated July 27th, 1908.

CHAS. C. HOUPT,
United States Attorney and Solicitor for Defendant.

The foregoing petition on appeal is granted, and the claim of appeal herein made is allowed.

It is Further Ordered, That a certified transcript of the record, testimony, exhibits and all proceedings herein be transmitted to the United States Circuit Court of Appeals for the Eighth Circuit within sixty days from the date hereof.

It is further Ordered, that this appeal act as supersedeas in said cause.

Dated July 28th, 1908.

PAGE MORRIS, Judge.

254 And on the same day, to-wit: July 28th, 1908, the defendant filed its Assignments of Error and Prayer for Reversal of the Decree, which is in the words and figures following, to-wit:

255 In the Circuit Court of the United States, District of Minnesota, Sixth Division.

Edward L. Warren, Complainant,
No. 181. vs.
The United States of America, Defendant.

Assignment of Errors.

Comes now the defendant in the above entitled cause and files the following assignments of error upon which it will rely on its appeal from the decree made by this Honorable Court on the 5th day of May, 1908, in said cause:

I.

In finding and deciding that the Complainant was entitled to select as and for his allotment the land described in the complaint in said cause, and entering a final decree therein and adjudging and decreeing that he is entitled to patent therefor.

II.

In not making and rendering a decree in favor of the defendant and against the complainant, adjudging and decreeing that said land had been legally allotted and appropriated, and was not subject to allotment for or in behalf of said complainant.

III.

In holding and deciding that the two Mooers children, Lewis and Alice, were not entitled to allotments on the White Earth Indian Reservation under the Act of January 14, 1889, and that their only right to allotments was created by the "Steenerson" Act of April 28, 1904.

IV.

In holding and deciding that until the Act of April 28,
256 1904, said Mooers children were only entitled to allotments of agricultural land.

V.

In holding and deciding that under the "Steenerson" Act, the complainant had the same right to additional allotments as said Mooers children to original allotments, and that if the agent had the right to reject complainant's application, he

had the right to reject the application of Samuel E. Mooers made on behalf of said minor children.

Wherefore, said defendant prays that the decree of the said Circuit Court of the United States, District of Minnesota, Sixth Division, be in all things reversed.

Dated July 27th, 1908.

CHAS. C. HOUPT,
United States Attorney and Solicitor for Defendant.

257 And on the same day, to-wit: July 30th, 1908, a Citation with admission of service thereon by the complainant was filed, which said original citation and admission of service thereof is hereto attached and made a part of this return, viz:

258 In the Circuit Court of the United States, District of Minnesota, Sixth Division.

Edward L Warren, Complainant,
No. 181. vs.
The United States of America, Defendant.

Citation.

The President of the United States to Edward L. Warren, and to George B. Edgerton, Solicitor for said Complainant—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an order allowing an appeal entered in the Clerk's office of the Circuit Court of the United States for the District of Minnesota, Sixth Division, in that certain action numbered 181, in which Edward L. Warren is complainant and appellee, and the United States is defendant and appellant, to show cause, if any there be, why the decree rendered against the said defendant and appellant as in the said order allowing said appeal mentioned should not be corrected and reversed and why speedy justice should not be done to the defendant in that behalf.

Witness the Honorable Page Morris, District Judge, presiding at said Circuit Court at Duluth, Minnesota, this 28th day of July, A. D. 1908.

PAGE MORRIS, Judge.

Original. No. 181. United States of America, District of Minnesota. Circuit Court. 6th Division. Edward L. Warren,

vs. United States of America, Defendant. Citation. Due & personal service of the within citation is hereby admitted this 29th day of July, A. D. 1908, at St. Paul, Minnesota. Geo. B. Edgerton, Attorney for complainant. Filed July 30th, 1908, Henry D. Lang, Clerk. By L. A. Levorsen, Deputy.

259 And thereafter, to-wit: August 15th, 1908, a stipulation was filed herein [consolidation] the two cases for the purpose of this appeal, which said stipulation is in the words and figures following, to-wit:

260 In the United States Circuit Court, District of Minnesota, Sixth Division.

Annie Fairbanks, a minor, by her guardian ad litem Benjamin L. Fairbanks, Plaintiff,

vs.

The United States of America, Defendant,

No. 181. and

Edward L. Warren, Plaintiff,

vs.

The United States of America, Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above entitled action, by their respective Solicitors, as follows:

That the above named causes were tried together: the same testimony being applicable to both cases was made the basis of decision in each case: that said causes having been appealed by the defendant to the Circuit Court of Appeals, Eighth Circuit, the Clerk of the United States Circuit Court is requested to return the testimony in the Annie Fairbanks case only to the end that duplication may be obviated, and that the record on appeal in said Annie Fairbanks case may be referred to and considered as a part of the above named Warren case to the same extent and as fully as if the testimony was embraced therein. The purpose of this stipulation being the avoidance of unnecessary expense of returning and printing the entire record in both cases.

That this stipulation may be filed and made a part of the record in each case.

Dated this 12th day of August, 1908.

GEORGE B. EDGERTON,
Solictor for Annie Fairbanks and Edward L. Warren, Plaintiffs.

CHAS. C. HOUPT,
United States Attorney, and Solicitor for Defendant.

Filed Aug. 15, 1908.

261 And thereafter, to-wit: September 1, 1908, an order was filed and entered consolidating the two cases for the purpose of this appeal, which said order is in the words and figures following, to-wit:

262 United States Circuit Court, District of Minnesota,
Sixth Division.

Annie Fairbanks, a minor, by her guardian ad litem Benjamin L. Fairbanks, Plaintiff,
No. 180. vs.
United States of America, Defendant.

Edward L. Warren, Plaintiff,
No. 181. vs.
United States of America, Defendant.

Whereas, it appears from the stipulation to that effect duly filed herein on the 15th day of August, 1908, that the above entitled causes were tried together; that the same testimony was applicable to both of said causes and was made the basis of the decision in each cause, and that the said causes have been appealed by the defendant to the United States Circuit Court of Appeals for the Eighth Circuit.

Now therefore, in accordance with the terms and provisions of the said stipulation, it is by the Court—

Ordered: That the Clerk of this Court in making his transcripts and returns upon said appeals shall include therein only the testimony in the Annie Fairbanks case and that the transcript and record on appeal in the said Fairbanks case may be referred to and considered as a part of the above named Warren case to the same extent and as fully as if the testimony was embraced therein.

Sept. 2d, 1908.

PAGE MORRIS, Judge.

263 United States of America.

Circuit Court of the United States—District of Minnesota, Sixth Division.

I, Henry D. Lang, Clerk of said Circuit Court, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for Eighth Circuit, that the foregoing, consisting of 262 pages, numbered consecutively from 1 to 262 inclusive, is a true and complete transcript of the Records, Process, Pleadings, Orders, Final Decrees and all other proceedings in said two causes, viz:—Annie L. Fairbanks, etc., vs. United States (No. 180) and Edward L. Warren vs. United

States (No. 181) and of the whole thereof, as appears from the original records and files of said Court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court, at Fergus Falls in the District of Minnesota, this 12th day of September, A. D. 1908.

Seal
U. S. Circuit Court
Dist. of Minnesota
Sixth Division.

HENRY D. LANG, Clerk.
By L. A. Levorsen, Deputy.

Filed Sep. 19, 1908. John D. Jordan, Clerk.

(*Appearance of Counsel for Appellee in Cause No.* 2926.)

On the twenty-first day of September, A. D. 1908, the appearance of counsel for appellee was filed in cause No. 2926, in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Eighth Judicial Circuit, December Term, A. D. 1908.

THE UNITED STATES OF AMERICA, Appellant,
vs.
ANNIE FAIRBANKS, a Minor, by Her Guardian ad Litem, BENJAMIN L. FAIRBANKS, Respondent.

Error from the United States Circuit Court for the District of Minnesota, Sixth Division.

To the Clerk of the above-named Court:

You will please enter my appearance as solicitor for the Respondent in the above entitled cause.

Dated St. Paul, Minnesota, August 25th, 1908.

GEO. B. EDGERTON,
Solicitor for Respondent.

(Endorsed:) No. 2926. United States Circuit Court of Appeals, for the Eighth Judicial Circuit. The United States of America, Appellant, vs. Annie Fairbanks, a minor, by her guardian ad litem Benjamin L. Fairbanks, Respondent. Filed Sep. 21, 1908, John D. Jordan, Clerk. Geo. B. Edgerton, Solicitor for Respondent, St. Paul, Minnesota.

(*Appearance of Mr. Charles C. Houpt as Counsel for Appellant in Cause No.* 2926.)

And on the twenty-third day of September, A. D. 1908, the appearance of Mr. Charles C. Houpt, as counsel for appellant, was filed in cause No. 2926, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2926.

UNITED STATES, Appellant,
vs.
ANNIE FAIRBANKS, a Minor, by BENJAMIN FAIRBANKS, Her Guardian ad Litem.

The Clerk will enter my appearance as Counsel for the Appellant.

CHAS. C. HOUPT,
United States Attorney, St. Paul, Minn.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2926. United States, Appellant, vs. Annie Fairbanks, a minor, etc. Appearance. Filed Sep. 23, 1908, John D. Jordan, Clerk. Charles C. Houpt, Counsel for Appellant.

(*Appearance of Mr. R. J. Powell as Counsel for Appellant in Cause No.* 2926.)

And on the nineteenth day of January, A. D. 1909, the appearance of Mr. R. J. Powell, as counsel for appellant, was filed in cause No. 2926, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2926.

UNITED STATES, Appellant,
vs.
ANNIE FAIRBANKS, a Minor, etc.

The Clerk will enter my appearance as Counsel for the Appellant.
R. J. POWELL,
312-14 *Lumber Exch. Bldg., Minneapolis, Minn.*

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2926. United States, Appellant, vs. Annie Fairbanks, a minor, etc. Appearance. Filed Jan. 19, 1909, John D. Jordan, Clerk. R. J. Powell, Counsel for Appellant.

(*Order of Submission in Cause No.* 2926.)

And on the twenty-second day of January, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in cause No. 2926, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1908.

FRIDAY, *January* 22, 1909.

No. 2926.

UNITED STATES, Appellant,
vs.
ANNIE FAIRBANKS, a Minor, et al.

Appeal from the Circuit Court of the United States for the District of Minnesota.

This cause having been called for hearing in its regular order, argument was commenced by Mr. R. J. Powell in behalf of the ap-

pellant, continued by Mr. George B. Edgerton for the appellees and concluded by Mr. R. J. Powell for the appellant.

Thereupon the cause was submitted to the Court upon the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the third day of June, A. D. 1909, the opinion of said United States Circuit Court of Appeals for the Eighth Circuit, was filed in said causes Nos. 2926 and 2927, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2926, May Term, A. D. 1909.

UNITED STATES, Appellant,
vs.
ANNIE FAIRBANKS, a Minor, by BENJAMIN FAIRBANKS, Her Guardian ad Litem, Appellee.

Appeal from the Circuit Court of the United States for the District of Minnesota.

No. 2927, May Term, A. D. 1909.

UNITED STATES, Appellant,
vs.
EDWARD L. WARREN, Appellee.

Appeal from the Circuit Court of the United States for the District of Minnesota.

Mr. R. J. Powell (Mr. Charles C. Houpt, U. S. Attorney, filed a brief) for appellants.
Mr. George B. Edgerton for appellees.

Before Adams, Circuit Judge, and Riner and Amidon, District Judges.

These suits involve conflicting claims to two 80-acre allotments of land on the White Earth Indian Reservation under the General Allotment Act (24 Statutes at Large, 388), the Nelson Act (25 Statutes at Large, 642), and the Steenerson Act (33 Statutes at Large, 539). On the 29th of June, 1904, the plaintiffs, Annie Fairbanks and Edward L. Warren, presented to the Indian Agent in charge of the White Earth Reservation applications for allotments of the land in question as "additional" allotments under the Steenerson Act. The agent declined to receive the applications upon two grounds. First, because the qualified residents on the reservation

have been discussing, including the treaty of 1867, along with the history and practice of allotments on the reservation and the negotiations with the Indians.

4. *Right to take "Pine" lands.*—We agree with the learned counsel for plantiffs (Br., 31–36) that the lands classified as pine lands *outside* of the reservation, which had been ceded by the Indians to be sold for their benefit, were not allotable. The case of Nellie Lydick (29 L. D., 119) is directly in point here, but the point itself is immaterial. The legality of retaining a body of such lands in the reservation for the benefit of the tribe, as suggested by the commissioners in their report of December 26, 1889 (House Ex. Doc. 247, *supra*, p. 34), appears to have been at first questioned by the Secretary of the Interior (ib., p. 6). The doubt seems, however, to have been in some manner removed, and lands of that character were actually retained in the diminished reservation.

The Indian Office early expressed the view that they

> should be reserved from individual allotment for the common benefit of all the Indians * * * unless there should not be sufficient land, aside from the timberlands to make the allotments to all the Indians entitled thereto. (Letter of August 31, 1892, R., 137.)

The Secretary in his final decision (R., 153) says:

> It is true that in the early work of the Chippewa Commission in making allotments

> on the White Earth Reservation, the office did direct that only agricultural lands should be allotted, reserving pine lands for the common benefit of all the Indians of the reservation, but after the passage of the Steenerson Act, which contemplated the allotment of all the lands of the reservation, such instructions necessarily could have no application.

Thus it would seem that these lands were at first withheld from allotment not expressly for the reason that they were not "advantageous for agricultural and grazing purposes" within the meaning of the general allotment acts, but upon the theory that they should be devoted to the benefit of all the Indians collectively.

It might be interesting, did the case require, to consider whether lands chiefly valuable for timber may properly be deemed "advantageous for agricultural and grazing purposes" if in fact they are so, or would become so upon removal of the trees. But the question is not presented by this record, because it is plain that if the tracts in controversy were not lawful subjects for allotments under the Nelson and general allotment acts, the Steenerson Act, which applies only to land "subject to allotment" and upon which the rights of the plaintiffs entirely depend, did not make them so. If, as was held by the Court of Appeals in these cases, and as has quite recently been held again by the same court in a case which may come before this court for revision (*Leecy* v. *United States,* C. C. A.

Eighth Circuit; opinion filed Sept. 18, 1911), the Steenerson Act "abrogated" the limitation against allotting pine lands, we submit that the limitation which it abrogated was not a prohibition imposed by the prior law, but a conservative restriction adopted by the department in the exercise of a discretion which, we think, under the circumstances, it had an implied power to impose for the benefit of the tribe. In other words, by directing additional allotments on such a scale as necessitated recourse to practically the entire reservation, the act in effect compelled the department to abandon its conservative policy and resort to every sort of land which under the existing statutes it was vested with power to allot. Whether the department was right in assuming that that power extended to lands solely or chiefly valuable for timber is, as we have indicated, another question.

But if we assume that the lands became allottable, they became, as the Court of Appeals has held, allottable for all purposes. They were then simply tribal lands subject to be allotted to individuals under the existing laws relating to allotments. There is nothing in the Steenerson Act, expressed or implied, to indicate that any particular body of land or any particular class of land was intended to be devoted exclusively to its fulfillment. It does not mention pine lands or refer to them directly or indirectly. As the Mooers children were entitled to select 80 acres each, they were entitled to take them from any lands within the

reservation which were subject to allotment. The plaintiffs complain that there was inequality in this, but if so, it was an inequality necessarily incident to the opening of any new body of desirable lands in a reservation to allotment. Those persons who have not received allotments have the advantage of selecting out of a new area; those who have taken their allotments under less favorable circumstances must be content with what they have received.

Besides this, what was the inequality in this instance? We have not found in the record the basis for the claims of gross discrepancy made in the opposing brief. Possibly there would have been more inequality in requiring the Mooers children, and others in like situation, to make their primary selections from the nontimbered lands then found in the reservation than there was in the course that was actually pursued.

For the foregoing reasons it is respectfully submitted that the appeals should be dismissed or the decrees affirmed.

ERNEST KNAEBEL,
Assistant Attorney General.

S. W. WILLIAMS,
Of counsel.

JANUARY, 1912.

APPENDIX.

The act of February 6th, 1901, amending the act of August 15th, 1894, and reads as follows:

Be it enacted, &c., That that portion of the act of August fifteenth, eighteen hundred and ninety-four, found on page three hundred and five of Twenty-eight Statutes at Large, be amended so as to read as follows:

That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper circuit court of the United States;

And said circuit courts are hereby given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (*and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant*);

And the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when

properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him.

But this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency:

Provided, That the right of appeal shall be allowed to either party as in other cases.

Sec. 2. That the plaintiff shall cause a copy of his petition filed under the preceding section to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter.

It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counterclaim set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises:

Provided, That should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises;

But the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court. (31 Stat., 760, ch. 217.)

The changes made by the amendment are italicized.

As amended December 21, 1911, subsection 24 of section 24 of the Judicial Code provides that the district courts shall have jurisdiction—

> Of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty. And the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands now or heretofore held by either of the Five Civilized Tribes, the Osage Nation of Indians, nor to any of the lands within the Quapaw Indian Agency: *Provided,* That the right of appeal shall be allowed to either party as in other cases.

Extracts from report of the Chippewa Commission of Dec. 30th, 1892:

* * * * *

ALLOTMENTS.

The allotment of lands in severalty on this reservation has been pushed with the utmost rigor. The first formal application for an allotment was taken December 9, 1891, but the progress made for several months was slow, by reason of an unfortunate disagreement between the Indians and the department in regard to the proper interpretation of that part of the act of January 14, 1889, relating to allotments.

The Indians maintain that an allotment of 160 acres was promised to each Indian of the Missis-

sippi bands of Chippewas, in open council, by the commissioners during the negotiation of the agreement, and they cite the printed proceedings of the council in proof of their claim. It was this promise, they assert, that in large measure secured the assent of these bands to the agreement. It was even maintained by the chiefs and head men at White Earth that they would never have signed the agreement without the positive assurance of receiving an allotment of 160 acres.

On the other hand, the department decided that as the agreement of January 14, 1889, provides that allotments be made in conformity with the general allotment act of February 8, 1887, the provisions of that act must govern in determining the quantity of land to which each allottee is entitled. Only 80 acres, therefore, could be legally given to each person without further legislation by Congress.

In conformity with this decision the commission was instructed to allot 80 acres to each person. Deeming this to be a plain violation of the promises of the commissioners, made and recorded in open council, when negotiating the agreement, the members of the Mississippi bands flatly refused to take their allotments. These bands include the White Earth, Gull Lake, Mille Lac, and White Oak Point Indians. They embrace the most influential, intelligent, and progressive element of the Chippewa Tribe, and their refusal to take their land exerted a wide influence that proved a great obstacle in this branch of our work.

To empower the department to lawfully fulfill the promises made by the commissioners, a bill was introduced in the Senate May 20, 1892, by Hon. H. L. Dawes, chairman of the Committee on In-

dian Affairs (S. 3184), "To provide for allotments to Indians on White Earth Reservation in Minnesota," the purpose of which is to give each Indian of the bands referred to 160 acres.

In order to remove the deadlock and enable the commission to go on with the allotment, this prospective action by Congress was made the basis of an arrangement between the commission and the principal chiefs and head men at White Earth, by which the Indians were to take an allotment of 80 acres, provided they be permitted to select an additional 80 acres to be held in reserve; and in the event of favorable action by Congress, the 80 acres so reserved to each Indian to then be made a part of his allotment. This arrangement was afterward approved by the honorable Commissioner of Indian Affairs during his visit at White Earth last September.

All opposition being withdrawn, the Indians accepted their allotments on the basis referred to. Two additional surveyors were put in the field in August, two more in September, and another was added to the force in October to push the work with all possible dispatch.

The result has been most gratifying, our rolls showing allotments taken for 1,647 persons. It is estimated there are about 700 persons on the reserve who have not taken allotments. When these are provided with land the schedules of White Earth, Gull Lake, Otter Tail, and Pembina Bands will be completed.

* * * * *

The Chippewa Commission has at all times refused to allot to any Indian pine lands upon the ceded lands or diminished reservation. The com-

mission believes that all pine land upon the diminished reservation should be kept for the benefit in common of those Indians residing upon such reservation, as any allotment of such class of land could be only for speculation and would finally result in defrauding the Indians. Unscrupulous persons could secure certain Indians to take allotments of pine upon ceded lands, after which these same persons could strip the land of pine timber under lease. The utmost care should be taken that all pine land is subdivided, appraised, and sold for the benefit of all the Indians in Minnesota, as the law contemplates. This can only be done by the watchful care of the commission in their business of allotments, and which thus far they have exercised and allowed no Indian to take an allotment valuable for pine growing thereon.

* * * * *

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FAIRBANKS *v.* UNITED STATES.
WARREN *v.* UNITED STATES.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Nos. 112, 113. Argued January 18, 19, 1912.—Decided February 19, 1912.

The Nelson Act of January 14, 1889, 25 Stat. 642, c. 24, providing for allotment of lands of Chippewa Indians in the White Earth Reservation was still effective as to those Indians who had not received allotments thereunder when the Steenerson Act of April 24, 1904, 33 Stat. 589, c. 1786, was enacted and such Indians were not required to await proceedings under the Steenerson Act to obtain their original allotments under the Nelson Act.

The Steenerson Act is part of a plan of legislation in regard to Indian allotments and modified and changed the prior general allotment acts of February 8, 1887, and February 28, 1891, by superseding certain of their provisions and enlarging the quantity of land to be allotted, and the scheme of legislation of which it is a part is to have existence and continuity of action until its purpose shall have been fulfilled. *Oakes* v. *United States*, 172 Fed. Rep. 304.

Under the Nelson Act and the other acts relating to Indian allotments in the White Earth Reservation, in force August 8, 1904, children born on the reservation subsequent to the final order and who had not had allotments were entitled to allotments of eighty acres.

Indians who had already received allotments under the Nelson Act were not entitled prior to August 8, 1904, to make selections of additional land under the Steenerson Act to the exclusion of one who had not received any allotment under the Nelson Act.

In a continuous proceeding in the Land Department under the Indian Allotment Acts all parties are chargeable with notice of the different steps taken.

Quære: Whether a decree can be made in a suit against the United States by a party claiming a selection under Indian allotment acts which would affect the rights of other claimants to the same land who are not parties to the suit.

THE facts, which involve the title to lands in the White Earth Indian Reservation, allotted under the Chippewa Indian treaty of 1867, and various acts of Congress relating thereto, are stated in the opinion.

Mr. F. W. Houghton, with whom *Mr. George B. Edgerton* was on the brief, for appellants.

Mr. Assistant Attorney General Knaebel, with whom *Mr. S. W. Williams* was on the brief, for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The appellants were plaintiffs in the court below, and we shall so designate them.

The plaintiffs, one a minor (No. 112) and the other an adult (No. 113), residing on the White Earth Indian Reservation, brought these actions to determine their rights, respectively, to allotments of land under the provisions of a treaty with the Chippewa Indians proclaimed April 18, 1867, and certain acts of Congress relating to such Indians.

The Government claims that two minor children of Samuel Mooers, also Chippewa Indians, residing on the reservation with their father, have been justly allotted the lands on account of a superior right under the treaty and acts of Congress. The cases were tried together and a decree was entered in each case in accordance with the prayer of the plaintiffs, respectively. The decrees were reversed by the Circuit Court of Appeals and the bills directed to be dismissed. 171 Fed. Rep. 337.

The treaty of March 19, 1867, and certain acts of Congress are elements in the controversy. The treaty provided that as soon as the location of the reservation should have been approximately ascertained it should be surveyed in conformity with the system of Government surveys, and that any Indian of bands parties to the treaty, either male or female, who should have 10 acres of land under cultivation should be entitled to a certificate showing him to be entitled to 40 acres and a like number of

acres for every additional 10 acres cultivated until the full amount of 160 acres should be certified. 16 Stat. 719, 721. This was denominated the "cultivation clause" and many allotments of 160 acres were made under it.

On February 8, 1887 (24 Stat. 388, c. 119), Congress passed an act "to provide for the allotment of lands in severalty to Indians on the various reservations." The first section of the act provided that where any tribe or band of Indians had been or should be located upon any reservation created for their use by treaty, act of Congress or executive order, the President was authorized, if the reservation or any part thereof was advantageous for agricultural and grazing purposes, to cause the reservation to be surveyed or resurveyed, and to allot the lands in severalty as follows: To each head of a family ¼ of a section, to each single person over 18 years of age, ⅛ of a section, a like fraction to an orphan child under 18 years, to each single person under 18 then living or who might be born prior to the date of the President's order directing allotment, 1/16 of a section. In case of deficiency the allotments were to be made *pro rata*. It was provided further that where the treaty or act of Congress setting apart the reservation provided for allotments in excess of those designated the allotments should be made in the quantities specified in such treaty or act.

This act was amended February 28, 1891 (26 Stat. 794, c. 383). The allotment to which each Indian was to be entitled was made ⅛ of a section of land. In case of an insufficiency a *pro rata* allotment as near as might be according to legal subdivision was provided. On January 14, 1889 (25 Stat. 642, c. 24), an act was passed entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota." It is known as the Nelson Act and provided for the appointment by the President of three commissioners to negotiate with the different bands of Chippewas for the cession of all their

lands except so much of the White Earth and Red Lake Reservations as the Commissioner should deem necessary for allotments to be made to the Indians. It also provided for the removal to the White Earth Reservation of all but Red Lake Indians and for allotments to such Indians on White Earth Reservation under the direction of such commissioners.

Section 4 of the act provided for the survey of the lands after the cession and relinquishment of the Indian title and that upon the report of the survey the Secretary of the Interior should appoint a sufficient number of competent examiners to go upon the lands thus surveyed and personally make a careful, complete and thorough examination of the same by 40-acre lots for the purpose of ascertaining upon which lots there was growing or standing pine timber, and the tract upon which such timber was standing or growing should be termed pine lands. The minutes of examination were directed to be entered in books showing with particularity the quantity of timber to be estimated by feet and the quality of timber, which estimates and reports should be filed with the Commissioner of the General Land Office as a part of its permanent records, and that officer should thereupon make up a list of such lands, describing each 40-acre tract separately, and opposite each description place the actual cash value of the same according to his best judgment and information, but such valuation should not be less than $3 per thousand feet, board measure. The list should thereupon be transmitted to the Secretary of the Interior for his approval, modification or rejection, as he may deem proper. It is further provided that "all other lands acquired from the said Indians on said reservation other than pine lands are for the purposes of this act termed agricultural lands." There are provisions for the sale of the pine lands in 40-acre parcels, for the disposal to actual settlers only of the agricultural lands, and that the money

received from both shall be deposited in the Treasury of the United States for the benefit of the Indians.

There are amending acts which need not be noticed. Then came the act of April 28, 1904 (33 Stat. 539, c. 1786), entitled "An Act to provide allotments to Indians on White Earth Reservation in Minnesota." It is called the Steenerson act. It authorized the President to allot to each Chippewa Indian legally residing on the White Earth Reservation, under the treaty or laws of the United States, 160 acres of land. The act recited that it was enacted in accordance with the express promise made to the Indians by previous acts and the treaty, and that the allotments should be made and the patents issued therefor should be in the manner and have the same effect as provided in the acts of February 8, 1887, and February 28, 1891. And it was provided "that where any allotment of less than one hundred and sixty acres has heretofore been made, the allottee shall be allowed to take an additional allotment, which, together with the land already allotted, shall not exceed one hundred and sixty acres." There is a provision, in case of insufficiency, for *pro rata* allotment, as follows: "That if there is not sufficient land in said White Earth (diminished) Reservation subject to allotment each Indian entitled to allotments under the provisions of this Act shall receive a pro rata allotment."

These acts constitute the statutory law of the case.

The facts are as follows: On June 29, 1904, and June 30, 1904, respectively, the plaintiffs, Annie Fairbanks, through her father, Warren, for himself, applied at the White Earth Agency for an additional allotment of 80 acres each, respectively, being the W. ½ and E. ½ of the N. W. ¼ of section 15, T. 142, R. 39. The applications were under the Steenerson Act, the plaintiffs having received their full quota under the Nelson Act. The applications were refused, on the ground that they could not then be received.

On August 8, 1904, Lewis and Alice Mooers, aged, re-

spectively, four and six years, made application through their father, Samuel Mooers, for an original allotment of 80 acres of land each under the Nelson act, the act of Congress approved January 14, 1889. The selection for Lewis was the same 80 acres applied for by Annie Fairbanks; the selection for Alice the same 80 acres applied for by Warren. In the Mooers' application the land was described as not pine land. At the time of the applications the Indian Agent was away, but his clerk received the applications, marking the land on the agency plats as allotted to them, and made the usual entries on the allotment roll. He made the allotment, therefore, as far as he could.

Subsequently the agent required the clerk to cancel the allotment on the ground that the lands were pine lands and notified Mooers of such cancellation, which was done by mail, and he was directed to select other lands for his children.

On April 24, 1905, the allotments were commenced on the reservation under the Steenerson Act, and on that date the plaintiffs, respectively, made application and were allotted the lands in controversy, they being the same as applied for by them on June 29th and 30th, 1904.

Against the action of the agent cancelling the allotments to Lewis and Alice on August 8, 1904, Mooers appealed to the Indian Office. The commissioner ruled in favor of his contention and directed the agent to re-allot the lands to Mooers' children. The agent, however, suspended action pending an investigation, which resulted in the commissioner, under the directions of the Secretary of the Interior, revoking his ruling and sustaining the allotments to plaintiffs. Other lands were directed to be allotted to the Mooers. Upon Mooers' appeal the last decision of the commissioner was reversed and the land directed to be allotted to his children.

The commissioner in his letter directing the restoration

of the allotment to the Mooers children, discussing the right of selection of pine lands, said: "It is true that in the early work of the Chippewa Commission in making allotments on the White Earth Reservation the Office did direct that only agricultural lands should be allotted, reserving the pine lands for the common benefit of all of the Indians of the reservation; but after the passage of the Steenerson Act which contemplated the allotment of all the lands of the reservation, such instructions necessarily could have no application."

The order of the commissioner allotting the land to the Mooers children, as we have seen, was reversed by the then Secretary of the Interior, but not on the ground that pine lands could not be selected. The ruling of the Secretary was on the ground that the selection by the Mooers was premature. The Secretary said: "The testimony shows that Mr. Mooers was at the Agency, arrived on Sunday, the day before the allotting began, but he did not take his place in line until quite late, if at all, but seems to have relied upon the fact that he had designated to a clerk at the Agency the particular lands which he desired, even after he had been told that the selections would not be recognized as against other claimants."

Secretary Garfield, in reversing the decision of his predecessor, took the view that "the applications of the Mooers children were for original allotments, were actually allowed, and that there were no valid reasons against such action." The Secretary also said that it was "plain that there was no reason for laying upon Mooers the rule governing additional allotments under the Steenerson act;" that is, that Mooers should appear in line and take his chances with other Indians. Concluding his opinion, the Secretary said: "It appears that allotments have been made to the Mooers children, for which Samuel A. Mooers says he did not apply. Our office will also adjust this matter accordingly."

From these repeated changes in views and decisions in the Interior Department we gain little light upon the controversy between the parties so far as it depends upon the interpretation of the statutes, and even the Government in this case is somewhat uncertain as to what position it will ultimately take. "It might," it says, "find occasion to reverse its former attitude by conceding the plaintiffs' claim or denying that any of the contestants is entitled." But it concedes "that lands classified as pine lands *outside* of the reservation which had been ceded by the Indians to be sold for their benefit, were not allotable."

We may gather, notwithstanding the confusion, that the department and all of the claimants regarded the Nelson Act as still effective as to Indians who had not received its benefits and the Steenerson Act as applying to additional allotments, leaving only the question whether allotments could be made of pine lands. If so, the allotments to the Mooers children were good, because selections under the Nelson Act were not required to wait for proceedings under the Steenerson Act. But notwithstanding the uncertainty and seeming confusion, the question in the case is simple when certain elements are kept in mind—that is, the distinction between the lands ceded and those not ceded but reserved for allotments.

Section 1 of the Nelson Act provides for the negotiation with the Chippewas "for the cession and relinquishment" of their title to their reservations, "except White Earth and Red Lake, and to all of those two *which may not be* required to *fill the allotments required by this* and *existing acts*." (Italics ours.) The land reserved for allotments is the diminished reservation, to which we shall presently refer, and § 3 provides for its allotment. Section 4 applies to the lands ceded, not those reserved for allotments, and provides for the examination of the pine lands and for their sale in 40 acre pieces. It provides also (§ 6) for the disposal of agricultural lands to settlers under the

homestead laws at $1.25 per acre, the proceeds of which and of the sale of pine lands to be put into the Treasury of the United States for the benefit of the Indians. § 7.

The department at first, as we have seen, regarded only agricultural lands as allotable, making no distinction between ceded and the reserved part of the reservation. In the reserved part (diminished reservation)—that is, the part that was to be allotted, there was no distinction made between pine land and agricultural lands. In the ceded part there was a distinction, but only in the manner of their disposition. Neither was allotable, not because of their character, but because of their situation. The Indian Department, as we have seen, took back its ruling and even if it was not done under the compulsion of the Steenerson Act, plaintiffs might have no ground of complaint. Certainly not if the first ruling was made under a misapprehension of the Nelson Act, as the Court of Appeals strongly intimates. However, the department justifies its last ruling under the Steenerson Act, and upon the decision of the Court of Appeals sustaining that ruling plaintiffs assign error.

It becomes necessary, therefore, to consider the Steenerson Act, and it may be well to repeat somewhat. The Steenerson Act authorized the President to allot 160 acres of land "to each Chippewa Indian now legally residing upon the White Earth Reservation under treaty or laws of the United States." And it was provided that where an allotment had theretofore been made of less than 160 acres an additional allotment should be made, which, together with the land already allotted, should not exceed that amount. The act is very direct as to quantity and there is no qualification as to the character of the land to be allotted, and no classification of the lands to cause misunderstanding. The general allotment act and the act of February 28, 1891, are referred to, but only to adopt the manner of the allotment and the effect of the patent.

The provision is: "The allotment shall be, and the patent issued therefor, in the manner and having the same effect as provided in the general allotment act." The manner of allotment is one thing and the kind of land to be allotted is another and cannot well be confounded, and we cannot hold that Congress did not observe or intend to make the distinction.

It is contended further that the Mooers' children being, respectively, 4 and 6 years of age, were not entitled to an original allotment under the Nelson Act.

The lower courts disagreed as to this contention, the Circuit Court supporting it and the Circuit Court of Appeals deciding that it was untenable. Plaintiffs in error urge that the Circuit Court of Appeals fell into error by assuming that § 1 of the act of February 8, 1887, was part of the Nelson Act, and hence decided that the power of the President to make allotments which was given by the former was a continuing power, and could be exercised from time to time in favor of those born upon the reservation subsequent to the first order. It is, however, insisted that under the Nelson Act the power to make allotments was taken from the President and vested in commissioners, and that the provision relied on by the Circuit Court of Appeals was omitted from the act, and it is insisted further that if it be considered part of the act the whole of the provision must be considered, and that it limits an allotment to $\frac{1}{16}$ of a section to any single person then living or who should be born prior to the date of the order directing an allotment of lands. Undoubtedly, if that part of the provision had remained the law an allotment of 80 acres could not have been made, but plaintiffs in error concede that it did not remain the law. It was superseded by the act of February 28, 1891, and they admit that "the Land Department has treated the act of February 28, 1891, as amending section 1 of the act of 1887. By such amendment the classification

found in the act of February 8, 1887, is entirely omitted, and the language is: 'To each Indian located thereon one-eighth of a section of land.'" The conclusion that plaintiffs in error draw from that provision is that being on the reservation at the instant of time the act was passed is a necessary condition. But such conclusion misses the meaning of the word "located." Of itself it has no reference to time. It has reference entirely to place and is used to designate upon what Indians the powers given by the act, when exercised, should operate—that is, "to each Indian located" on the reservation. The act was a part of a scheme of legislation to have existence and continuity of action until its purpose should be completely fulfilled. See *Oakes* v. *United States*, 172 Fed. Rep. 305.

This being so, the Steenerson Act is easily seen to be a part of the plan of legislation, and, contrary to the contention of plaintiffs in error, did modify and change the prior acts of Congress by superseding certain of their provisions and enlarging the quantity of land to be allotted.

It is finally contended that Secretary Garfield had no power to set aside the allotments to plaintiffs in error on an *ex parte* appeal. In other words they were entitled to notice and opportunity to be heard. *Garfield* v. *Goldsby*, 211 U. S. 249. The only evidence offered to sustain the contention is that of the attorney who testified that he appeared "before the department for Warren and Fairbanks in this case," and that he "did not learn until after the decision had been rendered on the rehearing or appeal" that an appeal had been taken from the letter or order of the Commissioner of Indian Affairs of July 13, 1906, in which the Commissioner directed the agent to cancel the allotments to Warren and Fairbanks and to restore the allotments to them. It may well be, as urged by the Government, that such testimony does not preclude the inference that other attorneys or Warren or the father of the Fairbanks had notice. We, however, do not con-

sider the inference material. It is manifest that the proceedings were single and continuous—at one time the Mooers prevailing, at others the plaintiffs in error, and finally the Mooers; and all were chargeable with notice of what was happening in regard to their rights. We have seen that an allotment to the Mooers children and that to plaintiffs in error were made without notice. The Mooers had a subsequent hearing, it is true, and the cancellation of the allotments to them ordered to be set aside. The latter order was suspended and an investigation instituted, upon which one Secretary decided in favor of plaintiffs in error and another Secretary decided in favor of the Mooers. The latter was considered as the final decision, and plaintiffs in error have sought its review in this proceeding.

It is objected by the Government that the Mooers children are necessary parties. The point was suggested by the Court of Appeals, but passed by, as the court said, because counsel had not raised it. A doubt was expressed, however, if a decree could be rendered seriously affecting the rights of the Mooers children without their being made parties. A query to the same effect was made in *Oakes* v. *United States, supra.*

The jurisdictional act has this provision as to a suit brought under it: "In said suit the parties thereto shall be the claimant, as plaintiff, and the United States as party defendant." It may well be contended, therefore, that the United States stands in judgment for all opposing claimants, not, it may be, excluding the power of the court to permit them to come in, or, in its discretion, to order them to be brought in. However, we are not called upon to decide the question. Upon the suit brought and case made by plaintiffs we decide that they have no grounds for the relief they pray.

The decree of the Circuit Court of Appeals is

Affirmed.